Saving Failed States: Sometimes A Neocolonialist Notion

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I. INTRODUCTION

A new concept recently entered the international legal and political discourse: that of disintegrating, collapsed, or failed nation-states.[1] Scholars allege two types of disintegration: the breakup of nation-states into smaller nation-states[2] and the implosion of states.[3] This article focuses upon the latter situation and specifically examines the contours of this phenomenon within the African context—where scholars most often propose trusteeship as a solution.[4] Africa is also the continent

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1. *See* COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY (I. William Zartman ed., 1993) [hereinafter COLLAPSED STATES]; Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1992); Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; Jon H. Sylvester, *Sub-Saharan Africa: Economic Stagnation, Political Disintegration and the Specter of Recolonization*, 27 LOY. L.A. L. REV. 1299 (1994); William Pfaff, *A New Colonialism*, 74 FOREIGN AFF. 2 (1995); Ruth Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301 (1995); Jennifer Widner, *States and Statelessness in Late Twentieth Century Africa*, 124 DAEDALUS 129 (Summer 1995); Paul Johnson, *Colonialism's Back—and Not a Moment Too Soon*, N.Y. TIMES, Apr. 18, 1993, at 22; Ali Mazrui, *The Message of Rwanda: Recolonize Africa?*, NEW PERSP. Q., Fall 1994, at 18; A. Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT'L L.J. 1706, 1709-1711 (1995); Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 886 (1995); Charles Krauthammer, *Rwanda: If the U.N. Can't Help, Ask South Africa*, INT'L HERALD TRIB., May 28, 1994; *cf.* Henry Richardson, III, *Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMPLE INT'L & COMP. L.J. 1 (1996).

2. THE WORLD ALMANAC AND BOOK OF FACTS 491 (Robert Famighetti ed., 1996) [hereinafter WORLD ALMANAC] (noting that examples include the break-up of the former Soviet Union into eleven sovereign states: Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tejikstan, Turkmenistan, Ukraine, and Uzbekistan). Disintegration may be accompanied by violence and leave the surviving state(s) in a state of war and chaos. The most recent prominent example of a violent scenario is the break-up of the former Yugoslavia into the states of Bosnia, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. On the African continent, the only example of this type of disintegration is Eritrea and Ethiopia. Eritrea gained independence from Ethiopia after a prolonged and bloody civil war against the Emperor and the then Marxists. *See* I. William Zartman, *Introduction: Posing the Problem of State Collapse*, *in* COLLAPSED STATES, *supra* note 1, at 3.

3. *See* Peter Vale, *Engaging the World's Marginalized and Promoting Global Change: Challenges for the United Nations at Fifty*, 36 HARV. INT'L L.J. 283, 288 (1995). Professor Vale notes a quiescence in both theoretical and practical debates on the systematic break-down of the nation-state. *See id.* Vale suggests that this silence "reveals more about the dominant discourses in international relations than it does about the state of the world." *Id.* Thus, he urges, it is crucial that we understand the declining confidence in state structures, and that we question concepts such as democracy, nations, sovereignty, and capitalism which despite their tangible manifestations, are only human constructs subject to change. *See id.* Vale believes that "world orders can be overturned." *Id.* at 288.

4. *See* Pfaff, *supra* note 1, at 4; Johnson, *supra* note 1, at 22; Mazrui, *supra* note 1, at 18. Dr. Mazrui proposes African controlled trusteeships with the Organization of African Unity, larger African states, or some regional African group acting as the trustee. *See id.*

where failure or collapse is alleged most often.[5]

An expanding number of African governments face increasing difficulties performing basic governmental functions and delivering essential services to their populations, resulting in severe societal dislocations and inordinate human misery.[6] Commentators, often under the banner of humanitarian intervention, beseech the international community, and more specifically the U.N., to restore crumbling governmental and civil structures.[7] The U.N. Security Council has sponsored com-

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Helman & Ratner propose "governance assistance" for states that are failing, but not yet failed. Helman & Ratner, *supra* note 1, at 13. Georgia, Zaire, and selected states in Africa and Asia would be eligible for this type of assistance. *See id.* The authors cite Bosnia, Cambodia, Liberia, and Somalia as states with governmental structures overwhelmed by circumstances and, therefore, candidates for trusteeship. *See id.* at 14-15.

5. States with questionable viability include Zaire, Nigeria, Burundi, Sudan, Angola, Mozambique, Ethiopia, Kenya, Cameroon, Sierra Leone, Togo, Algeria and Chad. Makau wa Mutua, *Putting Humpty Dumpty Back Together Again, The Dilemma of the Post-Colonial African State*, 21 BROOK. J. INT'L L. 505 (1995); Zartman, *supra* note 2, at 1 (citing NORMA YOFFEE & GEORGE L. COWGILL, THE COLLAPSE OF ANCIENT STATES AND CIVILIZATIONS (1988) and J. A. TAINTER, THE COLLAPSE OF COMPLEX SOCIETIES (1988)). The authors describe Rwanda, Somalia, and Liberia as "failed" or "collapsed," while other commentators note that at least ten other African nations are on the brink of collapse. While these commentators often cite or include lists of states they believe have failed or are in the process of failing, many do not pinpoint why they consider these particular states potentially unviable. *See, e.g.*, Helman & Ratner, *supra* note 1. Specific countries are discussed in some detail in COLLAPSED STATES, *supra* note 1 (identifying Angola, Mozambique, Sudan, Zaire, Burundi, and Algeria as potentially collapsed states); Zartman, *supra* note 1, at 3-5 (classifying Ethiopia, Somalia, Liberia and Rwanda as collapsed states and Chad, Uganda, and Ghana as reconstituted states); I. William Zartman, *Putting Things Back Together, in* COLLAPSED STATES, *supra* note 1, at 267, 267.

6. *See infra* notes 63-75 and accompanying text (discussing the effects of government failure to provide essential services in African countries); *see also* Jon H. Sylvester, *Impracticability, Mutual Mistake and Related Contractual Bases for Equitably Adjusting the External Debt of Sub-Saharan Africa*, 13 NW. J. INT'L L. & BUS. 258, 259 (1992) (citing A.W. Clausen *Financing Development in the Third World*, BANKERS MAG., May-June 1985, at 12) (describing the situation in Africa as desperate). Living standards declined for nearly a decade and continue to do so. *See* Dominick Salvatore, *The African Crisis, in* AFRICAN DEVELOPMENT PROSPECTS: A POLICY MODELING APPROACH 15 (Dominick Salvatore ed., 1989). This dire situation is attributed to drought, famine, external debt and an overall financial crises. *See id.* A little over one third of the population has access to safe drinkable water; there is one doctor for every 23,000 people; and only fifteen percent of all secondary school age children enroll in school. *See id.* at 16. Basic needs include improved housing, increased nutritional levels, access to drinking water, clothing, basic health care, and rudimentary education. *See* Massimo D'Angelo, *Economic Policies and Social Development, in* AFRICAN DEVELOPMENT PROSPECTS: A POLICY MODELING APPROACH 222, 225 (Dominick Salvatore ed., 1989).

7. *See, e.g.*, Gordon, *supra* note 1, at 330; Francis Mading Deng, *State Collapse: The Humanitarian Challenge to the United Nations, in* COLLAPSED STATES, *supra* note 1, at 217, 218.

prehensive projects in Somalia, Cambodia, and elsewhere.[8] The Secretary General advocates post-conflict peace-building by the U.N.,[9] and scholars propose paradigms to "save failed states,"[10] assist disintegrating states, or simply bring back colonialism.[11]

The trusteeship proposals presume some form of governmental breakdown. The first and most difficult question is to determine exactly what is meant by state "collapse" or "failure," and where, or if, this is indeed the state of events in any particular situation. Second, if it can be ascertained that there are specific instances of state collapse, is there some responsibility on the part of the international community to render assistance in certain defined circumstances.[12] Finally, one must

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8. *See Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 48th Sess., Supp No. 1, at 80-87, U.N. Doc. A/48/1 (1993). These projects could be termed peace-keeping, peace enforcement, peace-building or some combination thereof. *See* BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE: PREVENTATIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING, *Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council* (1992) (defining the terms "peace-keeping," "peace enforcement," and "peace-building").

9. *See* BOUTROS-GHALI, *supra* note 8; *see* Jarat Chopra, Peace-Maintenance: The Last Stage of Development (1996) (unpublished manuscript, on file with author).

10. *See* Helman & Ratner, *supra* note 1, at 12. According to Helman and Ratner, conservatorship fulfills the U.N. Charter objective of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights." *Id.* Conservatorship and trusteeship are used interchangeably in this article.

11. *See* Pfaff, *supra* note 1, at 2; Johnson, *supra* note 1, at 22; Charles Krauthammer, *Trusteeship for Somalia; An Old—Colonial— Idea Whose Time has Come Again*, WASH. POST, Oct. 9, 1992, at A27; Mazrui, *supra* note 1, at 18.

12. *See* Gordon, *supra* note 1, at 327 (noting that the obligation to assist is based on several theories). Humanitarian and human rights considerations may make intervention desirable and may create the most likely scenario for intervention. Francis Deng notes the:

> [H]umanitarian concern of the international community with state collapse and other causes of domestic violence that inflict hardship and suffering on masses of people. . . . [and] a new world order in which human dignity for all people at all levels will become a matter of cooperative security for the international community.

Deng, *supra* note 7, at 217.

Thus, human rights violations are viewed as a "legitimate area of concern for the international community and a basis for scrutinizing the performance of governments and other domestic actors." *Id.; see also* Gordon, *supra* note 1, at 332. The West bears at least some responsibility for the current state of affairs in Africa. Colonialism wreaked havoc on African political, social, and economic institutions and the continent may never recover from this domination. For example, the international community exploited Africa's primary resources and in the process left African states with narrowly based economies heavily dependent on primary resources. *See* Darryl C. Thomas & Ali A. Mazrui, *Africa's Post-Cold War Demilitarization: Domestic and Global Causes*, 46 J. INT'L AFF. 157, 171 (1992); David P. O'Brien, *Structural Adjustment Programs in Sub-Saharan Africa*, 19 FLETCHER F. WORLD AFF. 115, 121 (1995). Professor Richardson notes that Northern Tier States continue to control the resources that Southern Tier States need. *See* Richardson, *supra* note 1, at 8. He explains that "imposed and invited intrusion relative to Southern Tier [S]tates . . .

determine what strategy to utilize in providing the necessary assistance.

This article contends that a possible method of assistance, trusteeship, is and has always been a highly questionable concept. The very fact that scholars and commentators are seriously advocating this approach is an indication of how negatively we view certain communities. From this critical vantagepoint, the article will examine the trusteeship model and its desirability as an approach to an admittedly complex and difficult problem.[13] This article proposes that, rather than returning to a theory and system of subjugation, whose sub-text was racial and cultural inferiority, the international community should explore a more inclusive bottom-up approach that would genuinely attempt to take into account the first words of the United Nations Charter: *"We the peoples of the United Nations . . . [d]etermined . . . to reaffirm faith in fundamental human rights"*[14] and make intervention more legitimate in the eyes of a rightly suspicious Third World.[15]

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is an international fact of life" and should incorporate a human rights component. *Id.* Finally, international peace and security concerns may be a factor in international intervention. To the extent state failure generates a threat to international peace and security, the Security Council would have jurisdiction to intervene and restore the peace. *See* Gordon, *supra* note 1, at 326.

13. I have examined the many legal obstacles to imposing trusteeship in Gordon, *supra* note 1.

14. *See* U.N. CHARTER, PREAMBLE (continuing ". . . in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."). "We the peoples of the United Nations" was used in the Preamble "to emphasize that the Charter is an expression of the will of the people of the world and primarily concerned with their welfare." *See* LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 55 (1946). My goal is to construct a more inclusive approach, which the Preamble of the Charter espoused. Umozurike believes that the Preamble applies to "all peoples, dependent or independent." *See* U.O. UMOZURIKE, INTERNATIONAL LAW AND COLONIALISM IN AFRICA 82 (1979) (noting that dependent peoples surely did not represent themselves at the San Francisco conference). Ruth Russell, who has chronicled the Charter's creation notes that the founding states had:

> [T]he impossible task of expressing high aspirations for the future in terms of sometimes conflicting spiritual concepts; of reaffirming the basic principles and purposes of the Organization as embodied in the Charter; and doing all this in words that would appeal to the peoples of at least *fifty countries*, representing different systems of political, metaphysical, and ethical thought, and speaking a large variety of languages.

RUTH RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 914 (1958) (emphasis added). Africa was almost entirely colonized at this time and its peoples were not citizens of these fifty states. At best, they were represented by their colonial masters, who were present at the negotiation and signing of the Charter. Moreover, the U.N. was viewed as an organization of states and its goals were to be achieved through the actions of states. Thus, Goodrich and Hambro opine: "It is difficult to think of a single matter within the sphere of international relations or affecting relations *between states* which cannot be brought within the scope of the Organization's activities in the achievement of these comprehensive purposes." *See* GOODRICH & HAMBRO, *supra*, at 21 (emphasis added).

15. *See* Marc Trachtenberg, *Intervention in Historical Perspective*, *in* EMERGING NORMS OF JUSTIFIED INTERVENTION 15, 32 (Laura W. Reed & Carl Koysen eds., 1993) (explaining that intervention is a suspect doctrine for the Third World because it "arouses

Critical Race Theory[16] suggests a paradigm for listening to, and hearing, outsider voices[17] as well as for recognizing and questioning our own biases and assumptions about "the other." This article will attempt to utilize these theories in constructing an alternative paradigm.[18] This admittedly more complex and difficult

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memories of imperialism, colonialism, racism and national degradation"). Third World countries, that were the target of intervention, even humanitarian intervention, were stigmatized as inferior because Western countries historically used intervention either to degrade and intimidate or to bring countries up to European standards. *See id.* at 24. During the nineteenth century, intervention was proscribed only with respect to other European countries that were deemed sovereign, intervention in other parts of the world was commonplace, and non-intervention was not even an issue when it came to European expansion in sub-Saharan Africa or Russian expansion in Central Asia. By the end of the nineteenh century a double standard was firmly in place. The "civilized" nations of Europe and the United States had the right to control their own destinies free of foreign intrusion. The less civilized Asian and Latin American States, however, were fair targets of intervention. *See id.* at 23-24. While this view has partially dissipated in this century, "the power of intervention remains the power to stigmatize and political meaning is in large measure rooted in historical memory." *Id.*

16. *See* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World,* 65 S. CAL. L. REV. 2129, 2141 (1992) (noting that critical theory is not "wedded to one overriding doctrine or unified world view but rather is a set of basic insights and perspectives which undermine existing truths even as they foster the need for a theory of society which remains to be completed"). Mari Matsuda notes:

> Critical Race Theory (CRT) refers to the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that works towards the elimination of racism as part of a larger goal of eliminating all forms of oppression.

Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem,* 63 S. CAL. L. REV. 1763 n.3 (1990).

17. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323 (1987). Professor Matsuda argues that furthermore,

> those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining elements of justice.

Id. at 324. She suggests a "new epistomological source for critical scholars: the actual experiences, history, culture, and the intellectual tradition of people of color in America." *Id.* This article suggests that we seldom listen to certain voices and that by doing so now we could assist people in constructing their societies, rather than imposing our view of how such societies should be configured. It would mean taking into account and centering solutions on the experiences, history, and culture of the peoples that we are purportedly trying to help. As Professor Trachtenberg suggests, with respect to making intervention viable and legitimate, "it means listening to people we are not used to listening to, and understanding the limits of our own power and, especially on our own wisdom." *See* Trachtenberg, *supra* note 15, at 32.

18. It is acknowledged that this will be a Western model, meaning a variant on Western, albeit outsider Western, thought. Transferring Critical Race Theory (CRT) to the international level adds an additional and very complex layer making it more difficult to situate

approach directly contradicts the trusteeship model because the fundamental philosophy underpinning colonialism[19]—mandates and trusts—was that certain human beings, who were predominately black and brown peoples, were inferior to Europeans and simply incapable of governing themselves. Colonialism assumed that Western models of governance and organization were superior and that European precepts on these matters provided the universal definition of civilization.[20] As such, colonialism encouraged the adoption and utilization of Western models and precepts by all peoples. Thus, the non-European "other" was to be civilized and forced to adopt European principles, ideas, and institutions.[21]

It appears that the same assumptions, to varying degrees, underlie current paradigms to utilize forms of conservatorship.[22] Legitimizing trusteeship would con-

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"the other." However, attempts to do so have been made. *See* Henry J. Richardson, III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993) (considering how African-American perspectives differed from those of the majority population during the Gulf War); Adrien K. Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993). A number of scholars have applied feminist legal theory to international law. *See* Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: A Miracle for Breakfast*, 33 VA. J. INT'L L. 433 (1993); RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda B. Dallmeyer ed., 1993); *see also* Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992) (providing guidance because the author attempts to situate herself in the reality of the "other" and acknowledges the profound difficulties involved).

19. *See infra* notes 187-256 and accompanying text (explaining that colonialism includes mandates and trusts).

20. *See* Gerrit W. Gong, *The Standard of "Civilization" in* INTERNATIONAL SOCIETY 22 (1984) (explaining that the nineteenth century standard of "civilization" was a European standard equated with European civilization). Moreover, "the European standard of 'civilization' came genuinely to be emulated, albeit often grudgingly or fearfully, by many non-European countries. Each non-European country had to reconcile itself with, to adapt to, to imbibe, or to develop a syncretic compromise with, the European international society and its standard." *Id.* at 99.

21. *See id.* at 22.

22. This is despite what might be the best of intentions on the part of many who articulate these theories. The intent here is not to brand anyone as racist or to ascribe nefarious motives or purposes. In fact, it seems that many people writing about these matters honestly want to devise mechanisms that will assist human beings who appear to be undergoing a very difficult transition; they are addressing these difficult issues in an effort to devise solutions.

This article suggests that "we," meaning those grounded in the Western tradition, are accustomed to viewing certain peoples as "them," as "different," as "the other", who is incapable and who we must civilize, develop, and raise to our level. We ascribe our solutions to problems rather than listening to "their" story or view of their own situation. The Western view is seen as "universal," obviously correct, and to be imposed with basic assumptions that are unquestioned. The notion that those who do not support re-colonization are being "politically correct," Krauthammer, *supra* note 11, effectively crystallizes this

tinue the international law tradition of objectifying and viewing non-Europeans as "the other."[23] It then becomes not only possible, but also perfectly reasonable, to prescribe solutions that "we," the civilized West,[24] perceive will best address problems. Consequently, the concerns, ideas, culture, politics, and indigenous economies of certain peoples are largely ignored or dismissed.[25]

Utilizing the trusteeship model presupposes that Western modes of governance, politics, and social thought should triumph.[26] Once again the law will have changed in a direction that favors the institutions, interests, and philosophy of the West.[27] Moreover, the discourse is framed in a manner that makes this result seem logical and in the interest of both the peoples of the Third World and their kind-hearted patrons in the West.

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view. "Politically correct" folks simply will not acknowledge how incompetent these people really are, nor how superior we in fact are. On labeling people "politically correct," see Jamin B. Raskin, *The Great PC Cover-Up*, CAL. LAW. 68 (Feb. 1994).

23. *See infra* notes 313-328 and accompanying text. For an excellent discussion of colonized non-Europeans as the "other," see Antony Anghie, *"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 499-504 (1993); *see also* EDWARD W. SAID, CULTURE AND IMPERIALISM 197, 190 (1993) (suggesting that studying the relationship between the "West" and its dominated cultural "other" is "a point of entry into studying the formation and meaning of Western cultural practices themselves").

24. For a discussion of cultural differences and duality that make defining "the West" a difficult concept, see Gunning, *supra* note 18; *see also* W. E. B. DUBOIS, THE SOULS OF BLACK FOLK, (1903) *reprinted in* W.E.B. DUBOIS, WRITINGS 364-65 (Nathan Huggins ed., 1986) (noting the duality that is part of being Black in the United States has been addressed by a number of black scholars); Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2239 (1992); Judy Scales-Trent, *Black Women and the Constitution: Finding our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (discussing the special isolation of Black women). On the international level, this duality is multiplied.

25. *See* Ian Brownlie, *The Expansion of International Society: The Consequences for the Law of Nations, in* THE EXPANSION OF INTERNATIONAL SOCIETY (Hedley Bull & Adam Watson eds., 1984) (noting that in the immediate post-colonial era, European ideas of nationhood and self-determination were adopted and eventually resulted in statehood for former colonies, as opposed to restoration of the status quo ante); *see also* BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION STATE 111-116, 197-209 (1993) (describing the tendency of nationalist leaders, who absorbed and implemented policies in the wave of decolonization in the fifties and sixties, to discard most indigenous political formations); Mutua, *supra* note 5, at 519-523 (noting the arbitrary division of Africa by European powers and the resilience of colonial boundaries as one of the few successful undertakings of the post-colonial state).

26. The entire notion of conservatorship assumes that the incompetent must be cared for, educated, and taught the proper manner in which to conduct their affairs.

27. *See* James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 HARV. INT'L L.J. 327 (1985); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987).

This article urges that we not repeat the past by reviving colonialism but instead challenge and attempt to modify our assumptions, biases, and the presumption that we know what is best for others. Furthermore, we must modify the belief that our ideas and means of social organization are the only true legitimate forms.[28] There may be various ways to perceive a particular situation. Some views are roundly dismissed, however, and we often ignore or dismiss those we believe to be different and, by implication, inferior. These alternative accounts should be part, if not at the center, of the discussion on how to define and address the problem of disintegrating states. This article proposes that the models ultimately utilized include and respect diverse cultures and ideas. This approach disqualifies trusteeship, which beckons us to ultimately return to a racist tradition that found "others" inferior. It implores that we adopt international law and institutions to accommodate and respect these differences.[29]

Part I explores the hypothesis of "failed" or "collapsed" states and the imagery these terms invoke. It also examines some of the difficulties African states are experiencing at this particular historical juncture and the extent to which these adversities should be characterized as state "failure." Part II turns to contemporary proposals to utilize the trusteeship model and other forms of colonialism, as a solution to the problem of failed states. Part III examines international law and the colonial enterprise; the evolution toward varying degrees of international supervision, including how the U.N. trusteeship system functioned during its zenith and the decolonization/development discourse. It demonstrates that the underlying subcontext for *all* of these systems was a belief in racial and cultural inferiority and that these systems where supported and justified by a framework of international law, which rested upon similar assumptions.[30] Part IV critically appraises the use of the trusteeship model in contemporary international discourse, in light of its historical antecedents. It utilizes Critical Race Theory to assess the underlying as-

28. It is not simplistically suggested that the West is a monolithic whole, nor that everything it brings to the discourse is faulty, worthless, or erroneous. Nor am I suggesting some romantic idealized view of indigenous peoples, cultures, or political formations. Cultures are complex social constructs that change over time for a variety of reasons. Indeed, as Said notes, "the history of all cultures is the history of cultural borrowing; cultures are not impermeable." SAID, *supra* note 23, at 217. For example, just as Western science borrowed from the Arabs, the Arabs had borrowed from India and Greece. "Culture is never just a matter of ownership, of borrowing and lending with absolute debtors and creditors, but rather of appropriations, common experiences and interdependencies of all kinds among different cultures." *Id.*

29. International law operates in a cultural context, yet under a guise of neutrality. Some critical race theorists have examined this phenomena in the domestic context. The challenge here is to expose and then deconstruct international law's supposed neutrality. It is grounded in the Western liberal tradition and proceeds from that framework.

30. *See* Anthony Anghie, Francisco de Vitoria and the Colonial Origins of International Law (1996) (unpublished manuscript, on file with the author)(maintaining that international law was created because of the issues generated by Spain's encounter with the Indians). Thus, the very roots of international law are mired in the heritage of colonialism.

sumptions that often accompany views of "the other."[31] It investigates why we might be tempted to turn to colonialism when determining how to approach the problem of failing states in Africa and in examining the continuing pervasiveness of racism underlying contemporary calls to reinstate trusteeship. It will consider the confidence in the superiority of Western culture and its institutional structures, which support the belief that these structures are the only acceptable models for all peoples, thereby validating Western modes of governance and assistance as the only acceptable approaches to these problems.

Finally, Part V will utilize critical theory to begin to germinate fresh approaches to assistance. It will contemplate how the international community might assist peoples in determining their future, while simultaneously avoiding high imperialism.[32] It will focus on an alternative approach to the crisis of disintegrating states, which involves making space for, listening to, and hearing the voices of the people actually affected by the decisions being made. Part V will recommend that these human beings become active participants and the actual decision-makers in this process.[33] Moreover, it will argue for solutions firmly grounded in the culture, beliefs, and systems of the people we are seeking to help, solutions which are firmly anchored in their "imagined communities,"[34] not ours.

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31. *See* Vale, *supra* note 3, at 288 (noting that Critical analysis has the potential to assist us in "reconceptualizing the nature of international society and the structures supporting it"). Professor Vale also explains that "the structures which dominate our lives are only as permanent as we make them." *See id.* An example in the present context might be revisiting the entire concept of the state if state structures are no longer relevant to the populace living under those formations.

32. *See* SAID, *supra* note 23, at 166-8. High imperialism might be defined as a pronouncement "on the reality of native peoples as from an invisible point of sub-objective perception that displaces indigenous points of view. It insists on its scientific disinterestedness and on the steady improvement in the condition, character, and custom of primitives as a result of their contact with European civilization." *Id.*

33. "Peoples" as the central actors in the dialogue, in and of itself, may be at variance with the international system. Professor Richardson has called for a more people-centered focus on the part of the international system. He notes:

> Doubtless the "failed states" labels and proposals can be seen as a cry for something to be done. But the invocation of such labels and the content of "failed states" proposals only reinforce the same state-centric deficiencies reflected in present international law, including the U.N. Charter, reflect the prejudices that now accompany post-Cold war nationalism, and ignore the comprehensive imperative for international law to effectively protect the rights of peoples and other non-government people-representative entities in the global tide of interdependence and communications simultaneity.

Richardson, *supra* note 1 at 11 (citing W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859 (1990)); Vale, *supra* note 3, at 290; Maivan Clech Lam, *Making Room for Peoples at the U.N.: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603, 605, 621 (1992).

34. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (rev. ed. 1991).

II. DISINTEGRATING STATES: THE PROBLEM[35]

A. DEFINING THE PROBLEM

Our discussion proceeds from the premise of the existence and legitimacy of the state. The assumption is that the state is a division of territories and populations into political jurisdictions that determine the identity, order, and authority within their boundaries.[36] Yet, as one commentator has noted, "[t]he state as analytical quarry is an elusive and complex prey."[37] Numerous definitions have been put forth and a number of critical elements identified.[38] The seeds of the modern state, however, can be found in fifteenth-century Europe,[39] and its traits have evolved to include territory, population, sovereignty, power, law, nationhood, and the ability to act internationally.[40]

The state is the "authoritative political institution,"[41] which possesses sovereignty over a defined territory.[42] Sovereignty has both internal and external dimen-

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35. A discussion of this topic can also be found in Gordon, *supra* note 1, at 306-11.

36. *See* Zartman, *supra* note 2, at 2.

37. *See* CRAWFORD YOUNG, THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE 13 (1994).

38. *See* Convention on Rights and Duties of States, Dec. 26, 1993, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 [hereinafter Montevideo Convention] (prescribing four qualifications for statehood: "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states").

39. *See* YOUNG, *supra* note 37, at 15. It spread to the rest of the world over the next four centuries through the globalization of imperialism and the responses to it. *See id.* States that escaped colonialism had to adopt European images and ideologies of the state in order to survive. Europe's stance at the center of contemporary theorists and philosophies on the state also accounts for the virtual eclipse of alternative visions of the state, which evolved over the last six thousand years. *See id.* at 14-16. Thus, although other intellectual traditions contain a rich body of theory on the state, all the main theories lead to Britain, the United States, France, Germany and Sweden. *See id.*

40. *See* YOUNG, THE AFRICAN COLONIAL STATE, *supra* note 37, at 25-35. Professor Young's discussion of these attributes not only illustrates their evolution, but also demonstrates how recent the very idea of the nation-state is. For example, with respect to territory, he notes that while states have always had "spatial dimensions," their demarcation was fluid and only well-defined at the center; territory often fluctuated at the periphery. *See id.* at 26. Only in the twentieth century were defined boundaries universally imposed over most of the globe. *See id.* at 26-27. Moreover, the concept of "nation" is a recent addition to the idea of the state, although it is now universally absorbed into the doctrine of the state. *See id.* at 32. Nationhood began to emerge at the time of the French revolution, which combined such concepts as popular sovereignty, and "an organic view of the human collectivity constituted by common culture and language." *Id.* Today, of course, the reasoning flows in reverse. Once a population is under the authority of a particular state, whose territory is sacrosanct, it is necessarily unified even if there is no common cultural identity. *See id.*

41. *See* Zartman, *supra* note 2, at 5.

42. *See id.* at 5. This definition centers on three functions: the state as the sovereign

sions. Internally, it gives the state dominion over its citizens. Externally, the state is an international legal person that is formally equal to every other state[43] and has the capacity to engage in international relations.[44] In this latter international sphere, the international community has not recognized state failure,[45] and indeed, many states deemed failures by commentators perform governmental functions vis-a-vis the outside world.[46] Rather, the problem seems to be in the internal sphere, where collapse means that the basic functions of the state vis-a-vis its populace are no longer performed.[47]

Gerald Helman and Steven Ratner describe failed nation-states;[48] Robert Kaplan warns of a coming anarchy;[49] Robert Jackson maintains that in many sub-Saharan African nations, statehood exists only in legal terms or what should be characterized as juridical statehood;[50] Jon Sylvester describes a widespread deterioration of conditions in specific countries and regions;[51] and I. William Zartman refers to a phenomenon where the structure, authority, law, and political order have fallen apart.[52] Various authors have described state collapse in Liberia, Somalia, Mozambique, and Ethiopia,[53] and the risk of collapse in at least a dozen other states.[54]

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authority—the accepted source of identity and in the arena of politics; the state as an institution and thus a tangible organization of decisionmaking and an intangible symbol of identity; and the state as the security guarantor for a populated territory. Because these functions are so intertwined, it becomes difficult to perform them separately. A weakening of one function drags the others. *See id.*

43. *See* U.N. CHARTER, art. 2, sec. 1; YOUNG, THE AFRICAN COLONIAL STATE, *supra* note 37, at 28. Professor Young notes that the this formal equality of states may explain why it has found such "universal and enthusiastic acceptance." *See id.* This immediately vested newly independent states with international standing and "an authority, supreme by virtue of its power." *See id.* at 29. This is also the aspect of juridical statehood that Professor Jackson discusses. *See infra* notes 85-91 and accompanying text.

44. *See* Montevideo Convention, *supra* note 38, art. 1.

45. *See* Gordon, *supra* note 1, at 336.

46. *See* Maxwell Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm Wine,* 29 CASE W. RES. J. INT'L L. 167 (1997). The State continues to determine issues of naturalization, raise and maintain a standing army, regulate external trade and tariffs, license and control foreign investment and immigration, levy and collect taxes on trades and manufactures, regulate money supply and credit, and enter into foreign or international agreements, treaties, and conventions with foreign governments, institutions, individuals, and international bodies.

47. *See* Zartman, *supra* note 2, at 5.

48. *See* Helman & Ratner, *supra* note 1, at 3.

49. *See Kaplan,* supra note 1, at 44.

50. *See* Robert Jackson, *Juridical Statehood in Sub-Saharan Africa,* 46 J. INT'L AFFAIRS 1 (1992).

51. *See* Sylvester, *supra* note 1, at 1301, 1305-12.

52. *See* Zartman, *supra* note 2, at 1.

53. *See* Barry Schutz, *The Heritage of Revolution and the Struggle for Governmental Legitimacy in Mozambique, in* COLLAPSED STATES, *supra* note 1, 109-110 (noting Mozambique is alleged to suffer from a lack of internal legitimacy). Although the international community recognizes the government, the citizens of the state do not. *See id.* Schutz be-

The common theme involves overwhelmed governments that are almost, if not completely, unable to discharge basic governmental functions. The state is judged unable to perform six crucial functions of statehood:

> [To] exercise sovereign control over territory; have sovereign oversight and supervision of the nation's resources; exercise the effective and rational collection of revenue; maintain adequate national infrastructure, such as roads and telephone systems; [and] have the capacity to govern and maintain law and order.[55]

As the decision-making center of government, the state is paralyzed and inoperative; laws are not made, order is not preserved, and societal cohesion is not enhanced. As a symbol of identity, it has lost its power of conferring a name on its people and a meaning to their social action.[56] State territory, is no longer assured security by a central sovereign organization.[57]

One commentator asserts that mounting evidence suggests that the African post-colonial state may soon disappear and that its implosion is progressing steadily.[58] He notes, "In virtually every statistical category, the state is in a downward spiral. Corrupt and dictatorial elites, unbridled militaries, ethnic tensions and economic misery have arrested—and in many cases reversed—almost all positive development."[59]

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lieves this lack of legitimacy stems partially from a lack of civil society, rising crime, and an incompetent bureaucracy bogged down in red tape. *See id.* at 113, 122. Liberian society has been shattered by civil war. *See* Martin Lowenkopf, *Liberia: Putting the State Back Together, in* COLLAPSED STATES, *supra* note 1, at 91. The "nation [is] fragmented, the population dispersed, and the economy ruined." *Id.* After President Tolbert was deposed, his successor Samuel Doe ruled the state in a manner that introduced and then exacerbated interethnic rivalry. *See id.* at 99. It is maintained that Ethiopia failed to address the "national question," and, instead, tried to downplay ethnicity. *See* Edmond Keller, *Remaking the Ethiopian State, in* COLLAPSED STATES, *supra* note 1, at 125, 128, 130. Later attempts to reorganize the regions were unsuccessful. *See id.* at 130-31. A major drought and later a coup further weakened the state. *See id.* at 131.

54. *See* Mutua, *supra* note 5, at 507.

55. *See* Dr. Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry,* 16 MICH. J. INT'L L. 1113, 1144 (1995) (citing Ali Mazrui, *African State as a Political Refugee: Institutional Collapse and Human Displacement,* INT'L J. REFUGEE L. 21, 23 (Special Issue 1995)).

56. *See* Zartman, *supra* note 2, at 5.

57. *See id.* at 6 (describing civil society as the social, economic, and political groupings that "structure the demographic tissue"). It is distinct and independent of the state, but potentially under its control and performs demand and support functions that influence, legitimize, and/or replace the state. *See id.* Whether pervasive state collapse occurs because the state as the authoritative political institution collapses or because the society beneath it has become incapable of providing the supports and demands the state needs, is difficult to determine. *See id.* Societal collapse is the extended breakdown of social coherence and maintenance. *See id.*

58. *See id.* at 506.

59. *See id.*

An even more dire view depicts rampant demographic, environmental, and societal stress in which criminal anarchy thrives.[60] This journalist predicts an implosion of the underdeveloped world that will entail the break-down of the nation-state, governments unable to provide such elementary services as policing, and an increasing inability to control national territory.[61]

B. WHY DISINTEGRATION

Various theories have been postulated regarding the cause of state collapse, some more complex than others. Disintegration has been attributed to prolonged civil strife,[62] which has disrupted essential governmental services, destroyed food supplies and distribution networks, and brought economies to a standstill.[63] Two cases of apparent central government collapse are found in Somalia[64] and Liberia.[65]

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60. Kaplan writes:

> Disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders, and the empowerment of private armies, security firms and international drug cartels are now most tellingly demonstrated through a West African prism.

Kaplan, *supra* note 1, at 46. Kaplan believes this scenario may portend what is in store for much of the developing world. *See id.*

61. *See id.* at 46. This view has been criticized as perhaps too apocalyptic. *See* PATRICIA J. WILLIAMS, *Black-Power Dream Barbie*, THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE 182, 203-08 (1995); Mutua, *supra* note 55, at 1115 n.10 (characterizing Kaplan's article as being written "in an idiom so revolting that it is searing in its absolute pessimism."); Sylvester, *supra* note 1, at 1323-25 (noting that Kaplan "writes off Africa").

62. *See* Zartman, *supra* note 2, at 7 (explaining that the origins of state collapse may also be found in some cases of state tyranny). The state may be so tyrannical that it results in a rebellion where the opposition is unable to fill the vacuum.. Prior to its collapse, the state may be very effective in destroying the regulative and regenerative capacities of society through repression and neglect. *See id.* As the collapsing state implodes, it saps the vital functions of society resulting not only in the disintegration of the governmental superstructure, but also the societal infrastructure. *See id.*

63. *See* Helman & Ratner, *supra* note 1, at 4-5. Powerful insurgencies in a number of states, including Liberia and Somalia, led to the described devastation. This devastation was compounded by natural disasters in several states including Somalia and Sudan. *See id.* at 5.

64. *See* Hussein M. Adam, *Somalia: A Terrible Beauty Being Born?*, *in* COLLAPSED STATES, *supra* note 1, at 69, 71. Adam lists internal factors which contributed to Somalia's collapse including: personal rule (Siyad Barre's rule evolved from scientific socialism (1970-1977), to autocracy (1978-1986), and finally to tyrant (1987-1991), which damaged and distorted state-civil relations); military rule (the size of the Somali army increased from 3,000 men soon after independence to 120,000 and was characterized as repressive); "clanklatura" (which entailed appointing trusted clansmen to positions of power and control); "nomenklatura" which resulted in appointing loyal political agents to control state institutions; the replacement of class rule by clan rule which encouraged regionalism and separatism and poisoned clan relations; state-sponsored terror; and a neo-fascist campaign against the north designed to punish the region for opposition to Barre's regime. *See id.* at 72-73. External factors contributing to Somalia's collapse included military, technical, and finan-

Rwanda presents a deadly variation of the civil war scenario where ethnic rivalries and tensions led to genocide and chaos in its aftermath.[65] Thus Rwanda, where massive genocide took place, is often cited as a collapsed state and Burundi is viewed as being at risk for collapse.[67]

Professor Sylvester[68] maintains that widespread poverty,[69] a heavy dependence

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cial foreign assistance from the USSR, armaments, and economic aid provided by the United States. *See id.* at 75.

65. *See* Lowenkopf, *supra* note 53, at 91. After 1990, Liberian President Samuel Doe consolidated power in his hands for the benefit of his ethnic group and alienated the rest of the country. Other groups arose to grasp for power as it fell from Doe to Taylor. *See id.* More than 20,000 people have died and over half of the population of 2.5 million has been displaced since the beginning of the civil war in December 1989. *See id.* at 92. "Not only is 'the state as a legitimate functioning order' absent, but society in general has been shattered, the nation fragmented, the population dispersed, and the economy ruined." *Id.* at 91.

66. *See* Donatella Lorch, *Rwanda Forces Shell Stadium Full of Refugees*, N.Y. TIMES, Apr. 20, 1994, at A8 (explaining 400,000 Kigali residents were displaced within 12 days of fighting); Julia Preston & Thomas W. Lippmann, *Refugee Flood Overwhelms Relief Efforts; U.N. Appeals for Supplies to Aid 2 Million Refugees*, WASH. POST, July 21, 1994, at A1 (noting U.N. estimates that of a total Rwandan population of 7.8 million, approximately 500,000 people were killed in ethnic massacres, 2.6 million were displaced within Rwanda, and another 2.6 million fled to Zaire, Tanzania, and Burundi); Julia Preston, *Rwandans Confound U.N. Security Council; Humanitarian Impulse as Mission Impossible*, WASH. POST, May 8, 1994, at A25 (reporting U.N. estimates of a three-week death toll near 200,000 and describing civilian murders as organized, government-led vendettas); *UNICEF Tending to the Children Who Survived War in Rwanda*, N.Y. TIMES, July 26, 1994, at A6 (explaining United Nations Children's Fund estimates of 250,000 children killed and more than 150,000 orphaned).

67. *See Burundi—Edging Nearer Genocide*, JANE'S INTELLIGENCE REVIEW—POINTER, May 1, 1995, at 8; *see also* Nomi Morris with Luke Fisher, *Burundi on the Brink*, MACLEAN'S, Feb. 12, 1996 (noting that U.N. Ambassador Madeleine Albright on returning from a visit to Burundi claimed that the country is "on the verge of national suicide"); *Ogata Arrives in Burundi on Mission to Prevent Bloodbath*, Agence France Presse, Jan. 7, 1996 (A Burundian journalist commented that "if we are not careful, our country risks collapsing").

68. *See* Sylvester, *supra note* 1, at 1299-1305. Professor Sylvester traveled through parts of East and West Africa, while he was a Fulbright Teaching Scholar.

69. *See* Tandeka Nkiwane Muzenda, *The Role of Social and Economic Factors and Natural Disasters in Forced Population Displacements in Africa*, INT'L J. REFUGEE L. 46, 48 (Special Issue 1995). Muzenda maintains that poverty levels have dramatically mounted in Africa with "ever-swelling numbers of people caught in a widening spiral of destitution, unemployment and distress. This pervasive sense of injustice and distress threatens the very social fabric of African societies." *Id.*

An estimated two-thirds of Africa's population lives below the poverty line. "[Thirty] of the poorest 40 countries in the world are in Africa. Exclude South Africa and the gross domestic product of sub-Saharan Africa, with a population of over 600 million, is roughly equal to that of tiny Belgium, with a population of about 10 million." Makau wa Mutua, *The Interaction Between Human Rights, Democracy and Governance and the Displacement of Populations*, INT'L J. REFUGEE L., 37, 37-38 (Special Issue 1995). "African countries

on foreign aid,[70] and stalled national economies[71] have resulted in some sub-Saharan economies being unable to furnish their populations with a rudimentary standard of living in such fundamental areas as nutrition,[72] housing,[73] medical care,[74] and education.[75] Failing economies almost inevitably lead to failing governments, according to Sylvester.[76] Moreover, there is also a general lack of public

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account for only [two] per cent of world trade. [Moreover], Africa's external debt rose from $56 billion in 1980 to $143 billion in 1989." *Id.; see also* Victoria Brittain, *African Debt Payments 'Imperil 21M Children'*, THE GUARDIAN, Feb. 20, 1996, at 16, *available in* LEXIS, Nexis Library, Curnws File (noting that "[b]y the end of the decade more than half the population of Africa—300 million people—will be living in poverty. Only half the population has the most basic of health care, and less than 50 per cent of the children complete primary school—and in contrast to other developing regions, these basic indicators are worsening.").

70. *See Africa-Development: The "If-the-Donors" Syndrome*, Inter Press Service, April 10, 1996, *available in* LEXIS, Nexis Library, Curnws File (describing sub-Saharan Africa's receipt of the most official development aid of all the regions in the developing world, amounting to $16.4 billion in 1993); Edward V.K. Jaycox, *Sub-Saharan Africa: Development Performance and Prospects*, 46 J. INT'L AFF. 81, 83, 85 (1992) (noting that while Africa has been continually losing its market share to other developing regions, development assistance to sub-Saharan Africa is now three times as great as that to other low- and middle-income countries); Tony Hawkins, *Opinion—Weaning Africa Off Aid*, REUTER EUR. BUS. REP., Apr. 29, 1996, *available in* LEXIS, Nexis Library, Curnws File (explaining that while Sub-Saharan Africa receives 36% of the global aid budget, the nations most dependent on development assistance in sub-Saharan Africa are Mozambique with aid constituting 88% of the GNP, Somalia with aid as 85% of the GNP, 38% in Tanzania, and in Rwanda, 36%); Ahmad Mardini, *Development-UNDP: Fund for Fight Against Poverty in Arab World*, Inter Press Service, Mar. 14, 1996, *available in* LEXIS, Nexis Library, Curnws File (explaining that 60% of UNDP resources go to the states the U.N. describes as least developed, including sub-Saharan Africa).

71. *See* Angeline Oyog, *Development-Debt: Burden Heaviest on Sub-Saharan Africa*, Inter Press Service, March 12, 1996, *available in* LEXIS, Nexis Library, Curnws File ("Except for sub-Saharan Africa, the [World] Bank noted that all other regions have recorded growths in export earnings that kept pace with the increase in their foreign debts. In its World Debt Tables . . . , the World Bank said that 33 out of the 40 countries classified as heavily indebted are in sub-Saharan Africa. The total debt stock of the region rose by five per cent, or to $223 billion in 1995.").

72. *See Human Development Report 1994*, U.N. Development Programme 27, 29 (1994).

73. *See* Sylvester, *supra* note 1, at 1318.

74. *See* WORLD ALMANAC, *supra* note 2, at 838-40 (noting that cumulative reported AIDS cases at midyear 1995 were estimated at 418,051 cases in Africa, whereas the estimate world-wide was 1,169,811 cases; and reporting the estimated total HIV cases at midyear 1995 for sub-Saharan Africa were at more than 11,000,000 cases whereas the estimate world-wide was more than 18,500,000 cases).

75. *See* Sylvester, *supra* note 1, at 1311; *see also* Federico Mayor et al., *Education: The Best Investment*, INT'L HERALD TRIBUNE, May 11, 1996 (describing education in sub-Saharan Africa where secondary education is available to only 17% of the children and "$2.5 billion is needed annually to provide universal primary education.").

76. *See* Sylvester, *supra* note 1, at 1311.

confidence that any of these problems will be dealt with effectively.[77] The continent has also faced natural disasters such as drought, floods, famine, AIDS, and rampant and unsustainable population growth.[78] Yet these obstacles are not new, and "disengagement from the state by the citizenry at large"[79] has been a topic of discussion for quite some time.[80] Clearly, more is at issue here.[81]

Other theories rely on more elusive, and perhaps more questionable, rationales. Zartman maintains that state collapse in Africa has actually occurred in two waves.[82] The first came toward the end of the second decade of independence when the regimes that replaced the original nationalist generation were overthrown and entire state structures were destroyed in the process.[83] The second surge began a decade later and continues today. Collapses in this second wave are characterized

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77. *See id.* at 1307; *see also* Mutua, *supra* note 55, at 1165 (noting that the inability of the post-colonial state to serve its citizens has diminished its sovereignty in the eyes of its populace. Social and ethnic groups are beginning to question why loyalty should be owed to bankrupt, abusive, and illegitimate entities). People are aware that the government is incapable of assisting them. This is evidenced by the lack of any safety net. Sylvester, *supra* note 1, at 1302 n.6; *see also* Thomas & Mazrui, *supra* note 12, at 161. Some of the economic difficulties African states are experiencing may be rooted in their colonial inheritance. For example, the focus on exporting primary commodities left emerging African nations with a narrow resource base that has made them vulnerable to plummeting commodity prices. O'Brien, *supra* note 12, at 121. Most countries were encouraged by development organizations to continue to support and expand such exports and were not successful in expanding this narrow base. *See id.*

78. *See* Michael Chege, *Remembering Africa*, 71 FOREIGN AFF. 146, 147 (1992); *see also* Donald H. Minkler, *The 1993 National Conference on Sustainable Solutions—Population, Consumption, and Culture*, 21 ENVTL. AFF. 271, 273-74 (1994) (describing the tendency for desired family size to decline even in Africa, "where contraceptive prevalence is still the lowest in the world"); Kenneth J. Bartschi, *Legislative Responses to HIV/AIDS in Africa*, 11 CONN. J. INT'L L. 169, 170-71 (1995) citing CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, GLOBAL HIV/AIDS: A STRATEGY FOR U.S. LEADERSHIP 21-22 (1994) (noting that "a family in some of the hardest hit parts of Africa may lose almost 75% of its income because of AIDS" and describing the tendency of young adults to become infected with AIDS, further hindering productivity and economic growth).

79. *See* Julius E. Nyang'oro, *The Evolving Role of the African State Under Structural Adjustment*, *in* BEYOND STRUCTURAL ADJUSTMENT 11, 21 (Julius E. Nyang'oro & Timothy Shaw eds., 1992).

80. *See id.*

81. *See* Thomas & Mazrui, *supra* note 12, at 166. Of course, one major change has been the demise of the cold war, which has decreased interest in Africa by the major powers.

82. *See* Zartman, *supra* note 2, at 2.

83. *See id.* at 2-3. Zartman cites state collapse in Chad between 1980-82 as a result of civil war that destroyed all branches of the central government; the fall of Idi Amin Dada in 1979-81, which left a power vacuum; and the lesser case of Ghana in 1979-80, where the center lost its control over the countryside, and its ability to perform government functions even in the cities. *See id.* at 3. These states ultimately rebuilt themselves. *See* Mutua, *supra* note 5, at 267.

by the overthrow of authoritarian regimes by new forces that destroy, but cannot replace, the previous government.[84] In such situations, government functioning and legitimacy recede. Professor Robert Jackson postulates that the current difficulties are rooted in the rush toward decolonization, which has resulted in a proliferation of weak nation-states in Africa and Asia.[85] These governments are now barely functioning.[86] He posits that many Sub-Saharan African states must be termed juridical states that exist only because of international recognition, rather than their capacity to govern.[87] As decolonization progressed, statehood was bestowed upon former colonies without regard to their capacity to govern or to the configuration of nationalities contained within their borders.[88] The primary objective was to have African, rather than colonial, rulers.[89] Once in place, the international community has generally supported the preservation of existing states[90] and, by intervening to prevent any regional dismantling of Sub-Saharan states, has maintained the artificial boundaries of the colonial period.[91]

A related theory that also centers on the decolonization process questions the nature of the entities created in the wake of decolonization.[92] Professor Mutua maintains that Africa was decolonized by the colonial powers rather than by Africans. Thus, decolonization and the creation of post-colonial states was as imposed by the West as colonial domination had been.[93] Newly independent states were not

84. *See* Marina Ottaway, *Democratization in Collapsed States, in* COLLAPSED STATES, *supra* note 1, at 235. The ultimate cause may also be mismanagement, abuses, and the pillage of resources by authoritarian regimes that often leaves most of the population without a stake in the existing system. As long as the authoritarian regime held power, the state held together, and thus state collapse can result from an authoritarian regime being unable to continue imposing control.

85. *See* Jackson, *supra* note 50, at 4-5.

86. *See id.* at 5-6.

87. *See id.* at 2. He believes their governing capacity is severely limited. *See id.* at 7-8.

88. *See* Jackson, *supra* note 50, at 2, 4-5. Jackson focuses on states and governments as being incapable of governing and explores juridical statehood as an obstacle to state building. *See id.* at 8-11. He discusses the incompetence of post-colonial governments in governing.

89. *See id.* at 4-5. According to Jackson, the international community granted juridical statehood to former colonies, with colonial elites in leadership positions, and validated states without regard to their methods of governing. *See id.* at 5-6.

90. *See* Gordon, *supra* note 1, at 336.

91. *See* Jackson, *supra* note 50, at 5-8. In general, foreign aid is given to states as long as the government controls the army, central bank, central government, et cetera. *See id.* at 8. Thus the government will be recognized as the state although its control may not reach beyond the capital city. *See id.*

92. *See* Mutua, *supra* note 55, at 1116. Professor Mutua does not seem to believe there was a rush toward decolonization.

93. *See id.* The post-colonial state was based on the boundaries drawn by the colonialists to preserve order among themselves, without regard to pre-colonial societies. *See id.* at 1118, 1134-1135. Thus, Mutua believes, as does Jackson, that the juridical state exists to engage in international relations with other nations but has little relevance to the lives of its citizens.

connected to the indigenous communities that were in place before the advent of colonialism,[94] and therefore, the contours of the resulting political entities were based on arbitrarily drawn colonial constructs.[95] According to Professor Mutua, it is "[t]he contrived and artificial citizenry of the African state [that] is at the center of this crisis."[96] One result of juridical statehood has been to maintain governments with little connection to their citizens. By assisting current governments, the international community may be keeping governments in power that do not effectively control the state.[97]

While the struggle against colonial rule within the confines of the colonial state created unity among different communities, it may not have been sufficient to form a national identity once independence was achieved.[98] Moreover, the process of nation building was hampered by an inability to dissolve loyalties to pre-colonial structures and formations and, more particularly, to ethno-political society.[99] Thus Professor Mutua questions whether African states are nation-states at all, given that "ethnicity and sub-nationalism have been correctly identified as some of the most inflammatory elements in nation-building."[100]

If we define a nation as a "group that shares a common history and identity and

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94. *See id.* at 1118-19. Thomas and Mazrui attribute the insecurity of African states in part to their arbitrary creation. Thomas & Mazrui, *supra* note 12, at 159. These authors suggest that because these states are not nations, the citizens suffer from an insecurity dilemma. *See id.*

95. *See* Mutua, *supra* note 55, at 1114-15, 1134-36; *see also* IAN BROWNLIE, AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA 9 (1979) (noting the persistence of colonial boundaries and that the "political map of Africa in 1914 is not very different" from the current political map). Independence movements adopted the divisions "of colonial administration as units for self-determination." *Id.* Yet in most instances, African frontiers divided tribes or groups and boundaries were drawn under circumstances that "militated against reference to tribal or ethnological considerations. . . . [Rather there was] liberal resort to straight lines and general features such as drainage basins and watersheds. . . . [A]ccidents of prior exploration and military penetration were often [used] to determine delimitations between [the possessions of] Britain, France, and Germany. *See id.* at 6. Moreover "lines were commonly drawn on maps at a stage when there was not very great knowledge of the region concerned." *Id.* In only a minority of cases were tribal distributions considered in the delimitation of frontiers. *See id.*

96. *See* Mutua, *supra* note 55, at 1144. It is ironic that the struggle against apartheid may have forged such a national identity in South Africa and Namibia. *See* Nyang'oro, *supra* note 79, at 23.

97. *See* Mutua, *supra* note 55, at 1160-61.

98. *See id.* at 1144. This also led to authoritarianism in emergent states, which was often exemplified by ethnic based favoritism for jobs, services, and other state-controlled resources. The new rulers viewed their power as an instrument of personal gain to be shared with elites from their ethnic group. *See id.*; GEORGE B.N. AYITTEY, INDIGENOUS AFRICAN INSTITUTIONS xviv, xviii-xx (1991).

99. *See* Mutua, *supra* note 55, at 1144. Loyalty in most pre-colonial societies was centered on lineage and tribe.

100. *See id.* at 1144-45.

is aware of [the fact that its citizens] are a people and not just a population,"[101] perhaps none of the post-colonial African states emerged as nation-states because none possessed the element of "nation."[102] Rather, each of the new states contained more than one nation, and thus the newly designated nation had to be created.[103] This lack of national identity, coupled with weak state systems or structures destroyed in the wake of civil strife, may exacerbate and accelerate state collapse.

In summary, state disintegration is attributed to the destruction of state structures by civil war and the destruction of such structures is so extensive that the emerging power structure finds it difficult, if not impossible to rebuild these bodies. In the absence of widespread and purposeful physical destruction, state collapse is found in weak states that cannot provide for the basic needs of their citizens and, thus, gradually become irrelevant and useless to the citizenry. The debate is whether this state of events is rooted in an authoritarianism that is no longer able to function, a disconnection or lack of a "nation" within these nation-states, or simply an unpreparedness or inability to govern.[104]

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101. *See id.* at 1145 (quoting Art Hansen, *African Refugees: Defining and Defending Their Human Rights, in* HUMAN RIGHTS AND GOVERNANCE IN AFRICA (Ronald Cohen et al., eds., 1993)). Benedict Anderson defines the nation as:

> [A]n imagined political community—and imagined as both inherently limited and sovereign. It is *imagined* because the members of even the smallest nation will never know most of their fellow-members. . . . It is imagined as *sovereign* because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm. . . . [I]t is imagined as a *community*, because . . . the nation is always conceived as a deep, horizontal comradeship.

Anderson, *supra* note 34, at 6-7.

Hobsbawm, on the other hand, postulates that it is impossible to define "nation." *See* E. J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 PROGRAMME, MYTH, REALITY 5-7 (1990). He notes that "the nation" is a recent newcomer in human history. *Id.* at 5.

> Attempts to establish criteria for nationhood . . . [include] criteria such as language or ethnicity or a combination of criteria such as language, common territory, common history, cultural traits or whatever else. . . . [But] objective definitions have failed . . . [because] exceptions can always be found. Either cases corresponding to the definition are patently not (or not yet)"nations" or possessed of national aspirations, or undoubted"nations" do not correspond to the criterion or combination of criteria. How indeed could it be otherwise, given that we are trying to fit historically novel, emerging, changing and, even today, far from universal entities into a framework of permanence and universality?

Id. at 5-6.

102. *See* Mutua, *supra* note 55, at 1145-46 (quoting Art Hansen, *African Refugees: Defining and Defending Their Human Rights, in* HUMAN RIGHTS AND GOVERNANCE IN AFRICA (Ronald Cohen et al., eds., 1993)).

103. *See id.* This effort may have failed.

104. *See* Chibundu, *supra* note 46 (questioning how and whether this differs from other temporary difficulties in various European historical periods). This is a complex question whose answer is beyond the scope of this article.

III. TRUSTEESHIP: THE PROPOSED SOLUTION

Several writers have advocated various forms of recolonization as a solution to the disintegrating state problem. The most detailed proposal is by Helman and Ratner who recommend conservatorship as the conceptual paradigm for U.N. assistance[105] and suggest direct U.N. trusteeship when there is a total breakdown of governmental authority. They find the theoretical basis for conservatorship in the domestic analogue of the polity helping those who are utterly incapable of functioning on their own, thereby necessitating a legal regime where the community itself manages the affairs of the victim.[106] The authors see a parallel incapacity in the international system and believe the U.N., as the polity, should consider a similar response to the plight of failed states. Their proposal would resurrect the old trusteeship system and apply it to states, a solution the authors admit is currently precluded under the Charter.[107] States would voluntarily relinquish control

105. *See* Helman & Ratner, *supra* note 1, at 13 (proposing three models: governance assistance, the delegation of governmental authority to the U.N., and direct U.N. trusteeship). Governance assistance assumes that a government that maintains some control over the instruments of the state still exists. Examples include Georgia, Zaire, and possibly a handful of states in Africa and Asia. *See id.* Governance assistance builds on existing technical assistance, but would be far more expansive. U.N. personnel would help administer the state, but final governmental authority would remain with the government. The U.N. might require economic changes, modify political structures and processes, and foster democratic institutions by drafting constitutions, organizing free elections, or strengthening civic institutions such as political parties and judicial systems. *See id.* at 14. Thus even at the least intrusive level, Helman and Ratner contemplate numerous measures to remake these entities in our image. Jeffrey Herbst offers a variation on this theme. *See* Jeffrey Herbst, *Challenges to Africa's Boundaries in the New World Order*, 46 J. INT'L AFF. 17 (1992) (noting that the International Monetary Fund, World Bank and bilateral donors have and will continue to play an important role in economic decisions, and therefore will and should condition aid on political changes and other reforms). Micro-management should be expanded. *See id.* The delegation of governmental authority to the U.N. allows it to make governmental decisions. In Cambodia, for example, governmental authority was delegated by warring factions that exercised final authority, provided they could agree. Helman & Ratner, *supra* note 1, at 14-15.

106. *See* Helman & Ratner, *supra* note 1, at 12. For an explanation of the analogy of international mandate and trust systems with domestic trusts in British and American law, see International Status of South West Africa, 1950 I.C.J. 128, 148-50 (separate opinion of Sir Arnold McNair) (explaining that "[n]early every legal system possesses some institution whereby the property (and sometimes the person) of those who are not sui juris, such as a minor or lunatic, can be entrusted to some responsible person as a trustee."); *see also* AARON M. MARGALITH, THE INTERNATIONAL MANDATES 42-44 (1930).

107. *See* U.N. CHARTER art. 77. The trusteeship system applied to territories currently held under Mandates, territories detached from enemy states as a result of the Second World War, and territories voluntarily placed under the system by states responsible for their administration. The inapplicability of the Trusteeship system to original or subsequent Members of the U.N. is made explicit in Article 78. *See* U.N. CHARTER art. 78. The authors recommend amending the Charter. Helman & Ratner, *supra* note 1, at 17. For a full discussion

over their internal and external affairs for a defined period.[103] Local authorities would turn over their powers to the U.N. and follow its orders. Thus, the U.N., or a group of states, would act as the administering authority.[109] Once it is determined that particular states have "failed," these states would be deemed victims and incapable of managing their own affairs in much the same way we view children as being incapable of managing their own affairs. The international community would then be designated to act on their behalf.

According to Helman and Ratner, conservatorship logically follows historic U.N. efforts in Non-Self-Governing Territories and the tradition of conditioning aid and credits on certain behavior.[110] They maintain that fully independent states might require protection and oversight and, thus, trusteeship should no longer be limited to territories that are not fully independent.[111]

Historian Paul Johnson[112] notes the past benefits of colonialism, the mistake of eradicating it quickly, and the current breakdown of normal government in several African states.[113] He believes the Security Council should commit a territory in which government authority has irretrievably broken down to one or more states empowered to impose order by force and assume political functions; trustees would possess such powers.[114] The mandate would be of limited duration but should last until there is effective self-government, which could take up to one hundred years.[115] These trusts would be subject to supervision by the Security

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of the inapplicability of the trusteeship system to Members of the United Nations, see Gordon, *supra* note 1, at 311.

108. *See* Helman & Ratner, *supra* note 1, at 16. Helman & Ratner believe that no state should be the unwilling object of the trusteeship system and that states would voluntarily relinquish authority. The U.N. and the affected state would negotiate a trusteeship agreement, which would contain the essential elements upon which state authorities would agree. *See id.* at 16-17. On the doubtful legality of this proposition, see Gordon, *supra* note 1, at 324.

109. *See* Helman & Ratner, *supra* note 1, at 16-17. The Security Council is suggested as the most efficient organ available, but given its limited experience with economic and social matters, a subgroup might be established in the UN Secretariat to oversee each conservatorship. *See id.*

110. *See id.* at 12.

111. The authors assert that extending this system to independent states would promote central Charter values such as human rights and stability in international relations. Moreover, the Charter entrusts the U.N. with achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights. They believe conservatorship would fulfill these goals. *See id.* at 12.

112. *See* Johnson, *supra* note 1, at 22. Johnson does not address the legal problems his proposals would entail and primarily focuses on reversing conventional political wisdom.

113. *See id.*

114. *See id.*

115. *See id.* at 22. Johnson maintains that the ultimate objective would be to take constitutional measures to insure a return to effective self-government. He believes that the mistakes of the 1960s should not be repeated. Trustees should not plan to withdraw until they are reasonably certain that the return to independence will be successful.

Council.

Johnson concludes that the West must abandon the conventional wisdom that all peoples are ready for independence since some states are simply not fit to govern themselves. He believes their "continued existence and the violence and degradation they breed is a threat to the stability of their neighbors and an affront to our consciences."[116] Johnson sees a moral issue that "the civilized world has a mission to go to these desperate places and govern."[117] A variation on this theme is a supposedly benign form of colonialism under the auspices of former colonial powers.[118]

Finally, it has been suggested that larger African states, the Organization of African Unity, or a group of African states might act as the trustee for a collapsed state.[119] Behind this proposal is the belief that by utilizing African or Asian trustees, the system would be less Western and presumably more in the interests of the new trust territories.[120]

The next section demonstrates, however, that colonialism in all of its guises rested on notions of paternalism and a presumption of racial and cultural superiority on the part of the colonizers. Moreover, colonialism was built upon views of a

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116. *See id.*

117. Johnson, *supra* note 1, at 22. I must agree with Professor Sylvester on the derogatory tone of this article. It is written in such disparaging terms, with respect to people of color and especially African people, that one wonders if the intent was to shock. *See* Sylvester, *supra* note 1. Yet it was initially published in a highly respected newspaper, the NEW YORK TIMES, and was apparently meant to be a serious piece. Moreover, given the proliferation of proposals to bring back colonialism, presumably it *has* been taken seriously.

118. *See* Pfaff, *supra* note 1, at 5.

119. *See* Ali Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, INT'L J. REFUGEE L. 21, 34-36 (Special Issue 1995). Mazrui suggests several solutions to state failure and political collapse. One is "unilateral intervention by a single neighboring power in order to restore order." *Id.* at 34. He also suggests unilateral intervention "with the blessing of a regional organization." *Id.* Another possible solution is self-colonization where segments of Africa colonize and annex other portions of Africa. *See id.* Mazrui also proposes regional integration, the establishment of an African Security Council, and the establishment of a Pan-African Emergency Force to handle crises. *See id.* at 35. In *The Message of Rwanda*, *supra* note 1, at 19 Mazrui contends:

> [W]hat I propose as a longer-term solution to the problems exposed by today's crises is the establishment of an African Security Council composed of five pivotal regional states, or potential pivot states, that would oversee the continent. This Council would have a Pan African Emergency Force, an army for intervention and peacekeeping, at its disposal. And there would also be an African High Commissioner for Refugees linked to the UN High Commission.

Id. The five states proposed as anchors are: Egypt (in the north), South Africa (in the south), Nigeria (in West Africa), Ethiopia or Kenya (in East Africa), and Zaire (in Central Africa).

120. *See* Ali Mazrui, *The Bondage of Boundaries: Why Africa's Maps Will Be Redrawn*, ECONOMIST, Sept. 11, 1993, at 28. Mazrui states, "a future trusteeship system will be more genuinely international and less [W]estern than it was under the old guise. Administering powers for the trusteeship territories could come from Africa and Asia, as well as from the rest of the membership of the U.N."

separate and distinct "other" that was viewed as being incompetent and, thus, subject to rule by those who were superior. These views also underlie current proposals to bring back colonialism.[121] One must ask why a system that has been deemed odious in the modern era is presently viewed as conceivably appropriate for some communities. Notions of cultural and racial superiority are tied up in the West's view of "the other," which have always undergirded colonialism however it has been constituted, and underlies any new colonial paradigm.

When commentators currently advocate trusteeship, they essentially consider what has been at the heart of the trusteeship system: how to bring "backwards" people to self-government.[122] This assumption is inherent in the very idea of conservatorship, which applies to those the law deems unable and incapable of caring for themselves, such as infants and the mentally ill.[123] This goal is implicit in the very language utilized. Terms such as "incompetence," "incapable," "not fit to govern," and "the duty of the civilized world to govern" abound.

Can such a system be rehabilitated to apply to states where central authority has deteriorated, and more importantly, should it be? Can the inherent inequality involved in one party deciding the proper course for the well being of another party be ameliorated by the international community as a whole (through the U.N.) undertaking the role formerly assumed by States?[124] In other words, can any form of colonialism truly be benign, rather than paternalistic and exploitative? Clearly we have come full circle, warranting a closer examination and analysis of a system most were overjoyed to discard,[125] but a system which has, nonetheless, become a model a number of scholars are arguing should be resuscitated.

IV. INTERNATIONAL SUPERVISION THROUGH TRUSTEESHIP

This Part will demonstrate that trusteeship was rooted in colonialism and al-

121. It explains why a dialogue that asserts the desirability of bringing back one of the most undemocratic systems to ever dominate the face of the earth can co-exist with a parallel dialogue asserting an emerging right to democratic governance. *See* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Gregory H. Fox & Georg Nolte, *Intolerant Democracies* 36 HARV. INT'L L.J. 1, 69 (1995); Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995).

122. Some commentators explicitly support this idea. *See* Pfaff, *supra* note 1, at 2; Johnson, *supra* note 1, at 22.

123. *See* MARGALITH, *supra* note 55, at 42-44 (comparing the concept of mandates to its domestic construct, conservatorship).

124. *See* Sylvester, *supra* note 1, at 1318 (discussing inherent inequality entailed in such a system when undertaken by states). It is clear that the system was used to further exploit the inhabitants of the territories and the fact that they had more protection in Non-Self Governing Territories does not belie this fact. *See* R.N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS 277 (1955).

125. *See* Mutua, *supra* note 55, at 1114 (explaining the rejection, normatively and practically, of colonialism and other forms of foreign occupation and control).

ways rationalized by notions of cultural superiority, if not pure and simple racism. Moreover, colonialism, in all of its forms, was fully supported and rationalized by international law. It is a system that has been rejected by the international community and it should not be accorded legitimacy by international law as we prepare to enter the twenty-first century.

The idea that racial inequality justified the superior race's subjugation of the inferior race was explicit and one of the most pronounced aspects of colonial rule.[125] Racist doctrines legitimized European dominance and buttressed the idea of cultural superiority.[127] European administration was "a trust for all mankind"[128] despite arguments against discrimination that were derived from anthropology and the rights of man.[129] European racialization of the world led to color consciousness,[130] and this underlying racial and cultural sub-context helped form the views

126. *See* R.J. Vincent, *Racial Equality, in* THE EXPANSION OF INTERNATIONAL SOCIETY 248 (Hedley Bull & Adam Watson eds., 1984). "Not merely was there a God-given mandate to rule, but the Europeans were to appear God-like in the eyes of the natives; and if not quite God-like, then at least in the relationship of masters to servants, or . . . parents to children." *Id.* at 251. The parents to children metaphor confirmed that Europeans were to govern, and non-Europeans were to remain deferential. *See id.* "Africans were believed to be . . . culturally retrograde and racially inferior." HENRY S. WILSON, THE IMPERIAL EXPERIENCE IN SUB-SAHARAN AFRICA SINCE 1870, 116 (1977).

> Imperialist talk of this period was thoroughly imbued with the notion that the ruled were permanently inferior to their new European rulers. It was therefore taken for granted that a position of subordination was desirable for Africans, even if some of them were too benighted to appreciate it as yet.

Id.

127. *See* Vincent, *supra* note 126, at 248. "The orthodox attitude [among the British] was to despise the natives and those who failed to do so were regarded as eccentric, or worse." *Id.* Standards were to be kept up "for the benefit of the natives, and the social hierarchy intricately constructed and maintained." *Id.* For instance, Indians could not advance beyond a certain point in an imposed hierarchy. *See id.* Amazingly, Indians often accepted this hierarchy, and aspired merely "to prosper so well as they could within it. . . . This psychological achievement of getting the slave to think as a slave . . . for Nehru, was the triumph of the British in India." *Id.* "The argument for European rule in India applied the more strongly to Africa," since "it was the Negro who stood most in need of civilization, for he was the lowest of human types. European intervention would liberate the African from the cruel and irrational system which bound him." *Id.*

128. *See id.* This "was a gloss on [the doctrine] that 'all political power which is set over men . . . in derogation from the natural equality of mankind at large, ought to be some way or other exercised for their benefit.'" *Id.* (omission in original) (citation omitted).

129. *See id.* at 249.

130. *See id.* at 241. Thus, for example, white workers who in Europe had been regarded as part of the lower class "were delighted on arrival" in the Cape Colony to find themselves at the apex of an aristocracy of color. Terence Ranger, *The Invention of Tradition in Colonial Africa, in* THE INVENTION OF TRADITION 211, 213 (Eric Hobsbawm & Terence Ranger eds., 1983). "[T]he racist law of conquest and colonization brought to the New World by Columbus and the Europeans who followed him continues to serve as an instrument of racial discrimination against indigenous peoples' rights of self-determination." Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination against*

of Africans that continue to this day. Notions of cultural and racial superiority always undergird colonialism and are necessary to contemplate colonialism.

Critical Race Theory (CRT) may assist in analyzing colonialism in its historical and modern forms. This project, however, must be approached with some caution[131] so as to avoid yet another American experience, albeit one marked by oppression,[132] being universalized.[133] CRT is part of the oppositional quality found in the work of many third world scholars and intellectuals.[134] It is:

Indigenous People's Rights of Self-Determination, 8 ARIZ. J. INT'L & COMP. L. 51, 67 (1991).

131. *See* Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other-isms)*, 1991 DUKE L.J. 397, 397 (observing "to people of color, who are victims of racism/white supremacy, race is the filter through which they see the world"). Thus it is not surprising that I, as an American and especially as an African-American, would see race as a defining paradigm internationally. I suspect it is more complex than this, however, and have tried to be conscious of the risks entailed in this exercise.

132. *See* SAID, *supra* note 23, at 229. Professor Said notes that there is also some merit in:

> [N]ot remaining trapped in the emotional self-indulgence of celebrating one's own identity. There is first of all the possibility of discovering a world *not* constructed of warring essences . . . there is the possibility of universalism that is not limited or coercive, . . . and most important, moving beyond nativism . . . means thinking of local identity as not exhaustive, and therefore, not being anxious to confine oneself to one's own sphere, with its ceremonies of belonging, its built-in chauvinism, and its limited sense of security.

Id.

133. *See id.* at 55 (noting the almost unquestioned assumption by Americans that it is our destiny to rule and lead the world). Said believes we assigned this destiny to ourselves and as a nation we face the deep and perturbing question of our relationship to others—other cultures, states, histories, experiences, traditions, peoples, and destinies. "[T]here is no vantage outside the actuality of relationships among cultures, among unequal imperial and non-imperial powers, among us and others; no one has the epistemological privilege of somehow judging, evaluating and interpreting the world free from the encumbering interests and engagements of the ongoing relationships themselves." *Id.* This belief in our destiny to lead appears to stem from our position as a world power and powerful cultural myths of America somehow being special and different from all other nations. Our economic and political dominance only confirm these myths.

134. *See id.* at 54 (discussing the oppositional quality in the work of many Third World scholars, especially those who are exiles, expatriates, or refugees living in the West). Said notes the work of these scholars in "trying to connect experiences across the imperial divide, in re-examining the great canons, in producing what in effect is a critical literature." *Id.*

> Moreover, their work should be seen as sharing important concerns with minority and "suppressed" voices within the metropolis itself: feminists, African-American writers, intellectuals, artists, among others. But here, too, vigilance and self-criticism are crucial, since there is an inherent danger to oppositional effort of becoming institutionalized, marginality turning into separatism, and resistance hardening into dogma . . . [T]here is always a need to keep community before coercion, criticism before mere solidarity, and vigilance ahead of assent.

Id.

> a form of oppositional scholarship; Critical Race Theory challenges the universality of white experience/judgment as the authoritative standard that binds people of color and normatively measures, directs, controls, and regulates the terms of proper thought, expression, presentment, and behavior.[135]

CRT seeks to identify values and norms that have been disguised and subordinated in the law, and to demonstrate that our experiences as people of color are legitimate, appropriate, and effective bases for analyzing the legal system and racial subordination.[136] Thus, Critical Race Theorists attempt to integrate their experiential knowledge, drawn from a shared history as "other,"[137] with ongoing struggles against racial hegemony.[138]

One strand of Critical Race thought examines and attempts to understand the underpinnings of race and culture and their impact on legal concepts.[139] In the international context, the additional layer of cultural inferiority and superiority, which is often, but not necessarily, shaped by race must be added to this paradigm. Colonialism and international law, which justified and supported colonialism, were constructs that embodied concepts of racial and cultural inferiority and superiority and justified domination and subjugation. This Part examines that history in some detail, arguing that to reconfigure trusteeship would, in many respects, repeat this

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135. Calmore, *supra* note 16, at 2160.

136. *See id.* at 2161. CRT is eclectic, "incorporating what appears to be helpful from various disciplines, doctrines, styles and methods." *Id.* at 2165. It embraces a number of broad concepts. *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). Professor Delgado identified ten themes that fall within critical race analysis:

> *[C]ritiques of liberalism*, which are implicit or explicit; (2)*story telling/counter story telling and naming one's own reality*, where writers employ parables, chronicles, anecdotes and counterstories to reveal the contingency and self-serving nature of the majoritarian mind set -that bundle of presuppositions, received wisdom, and shared cultural understandings persons in the dominant group bring to discussions of race; (3)*revisionist interpretations of American civil rights law and progress;* (4) *a greater understanding of the underpinnings of race and racism;*(5) *structural determinism*, which focuses on ways in which the structure of legal thought or culture influences CRT's content, frequently maintaining the status quo; (6)*race*, (7) *sex*, (8) *class and their intersections;* (9) *essentialism and anti-essentialism*, which is concerned with the appropriate unit for analysis, such as whether the black community is one or many communities; and (10)*cultural nationalism/separatism*, which examines whether people of color can best promote their interests through separation from the American mainstream.

Id.

137. *See* Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990) (distinguishing that the consciousness of racial minorities requires knowledge of the feelings and intangible modes of perception unique to those who have historically been socially, structurally, and intellectually marginalized in the U.S.).

138. *See id.* at 1864-65. According to Professor Barnes, the central elements include dual consciousness, a keen awareness of the value of theory to enhance practice, and an explanation of how differentiating characteristics usually compound, rather than explain or mitigate, racial oppression. *See id.* at 1865-66.

139. *See* Delgado & Stefancic, *supra* note 136, at 462-63.

process.

Structural determinism, another strand of Critical Race thought, focuses on the ways in which the structure of legal thought or culture influences its content and frequently contributes to maintaining the status quo.[140] International law's focus on the state as the central international actor, defining the state as to exclude certain people from that definition, is germane in this sphere. Moreover, the manner in which former colonies were finally incorporated into the international system dismissed, and may have then undermined, the political and civil formations within these communities.

A. THE COLONIAL ENTERPRISE

1. The Rise of Colonialism and Its Rationalizations

Professor Edward Said has defined imperialism as "the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory; 'colonialism,' which is almost always a consequence of imperialism, is the implanting of settlements on distant territory."[141] Alien domination and exploitation characterize colonialism; relations are inherently unequal and the domination is from foreign sources.[142] "After the 1880s colonialism emerged as the preferred system for exploiting Africa,"[143] and European powers proceeded to carve up the continent.[144]

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140. *See id.* at 463.

141. *See* SAID, *supra* note 23, at 9. Said notes:

> Empire is a relationship, formal or informal, in which one [S]tate controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining an empire.

Id. (quoting MICHAEL W. DOYLE, EMPIRES 45 (1986)).

Colonialism is also defined as "the political control of an underdeveloped people whose social and economic life is directed by the dominant power." YASSIN EL-AYOUTY, UNITED NATIONS AND DECOLONIZATION 3 (1971) (quoting T.R. ADAM, MODERN COLONIALISM: INSTITUTIONS AND POLICIES 3 (1955)). In Africa, European settlement began in the Cape of Good Hope in the later half of the 17th century "and gradually pushed northwards to the highlands of Zimbabwe and Kenya." UMOZURIKE, *supra* note 14, at 18.

142. *See* Raymond Ranjeva, *Peoples and National Liberation Movements, in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 101, 103 (Mohammed Bedjaoui ed., 1991).

143. *See* Sylvester, *supra* note 6, at 279 (explaining that the slave trade, extensive during the seventeenth and eighteenth centuries, was the principal resource that initially attracted Europeans to Africa). The British Empire and the United States banned the slave trade in 1807 and 1808, respectively, followed by European efforts to suppress the slave trade altogether. Mutua, *supra* note 55, at 1126. Suppressing the slave trade, however, led to the imposition of political control and eventually proved more destructive to the independence of African political communities than the slave trade itself. *See id.* Stamping out the slave trade formed part of the motivation and rationale for imperial expansion. *See* Hedley Bull, *European States and African Political Communities, in* THE EXPANSION OF INTERNATIONAL

By 1914, Europe held roughly 85 percent of the entire earth in some form of dependency, be it as colonies, protectorates, or dominions.[145]

SOCIETY 99, 107 (Hedley Bull & Adam Watson eds., 1984). The decline of the slave trade was also accompanied by the rise of legitimate trade in palm oil, gold, groundnuts and later in the century, minerals. Moreover, geographic exploration of the interior promoted newfound knowledge and concern by Europeans. *See id.*

For an extended discussion of international law and the slave trade, see UMOZURIKE, *supra* note 14, at 6-16 (noting that the slave trade had a severely debilitating effect on Africa, resulting in instability, a sense of inferiority, guilt and subservience on the part of Africans). This made Africans easy prey for colonialism, which followed. *See id. at* 5. Moreover, colonialism seriously disrupted the economic and social fabric of the societies affected and made it "much more difficult to acquire the attributes required to participate in the process of modern economic growth." NASSAU A. ADAMS, WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM 4 (1993).

Previous colonial empires in South and Central America were extinguished earlier in the nineteenth century. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 249-52 (1979); 21 ALFRED J. DEBERLE, HISTORY OF NATIONS 54, (Phillip P. Wells ed., 1928); 22 BRANTZ MAYER, HISTORY OF NATIONS 437-40 (Frederick A. Ober ed., 1928); R.L. WOODWARD, JR., CENTRAL AMERICA SINCE INDEPENDENCE 1-8 (Leslie Bethell ed., 1991).

144. *See* UMOZURIKE, *supra* note 14, at 17 (stating that numerous exploring expeditions were funded by governments, commercial companies, and learned societies). These expeditions began in the late eighteenth century, as the slave trade became less profitable. *See id.* Colonialism followed soon thereafter. *See id.* at 18. The European struggle for Africa, however, arose suddenly. "[I]t was precipitated by rivalries among the most powerful of the established colonial powers, France and Britain, [and] by the arrival of newcomers: Leopold II [in the Congo] . . . and Bismarck's Germany, whose whirlwind annexation of territory . . . between 1883 and 1885, . . . presented an unprecedented challenge to existing arrangements." Bull, *supra* note 143, at 109. Bilateral agreements and guidelines established during the Concert of Europe were used to partition Africa. *See id.* The Berlin Conference of 1884-45 established guidelines to minimize friction between the participating powers. *See id.* The Berlin Conference, attended by Turkey, the United States, and all of the European States except Switzerland, was also "a collective . . . legitimization of the partition process as a whole." *Id.; see also* Mutua, *supra* note 55, at 1127. Of course, the African peoples and political entities who were the subjects of the conference did not participate or have any input regarding the legality of this land-grab or the resulting loss in sovereignty. Rather, "Europeans felt they knew what was best for the natives." *Id.*

145. *See* SAID, CULTURE AND IMPERIALISM, *supra* note 23, at 8. Ten percent of Africa was colonized in 1870. By 1900 it had risen to 90%. The years 1900-1914 were a period of consolidation. UMOZURIKE, *supra* note 14, at 30. Britain had authority over Australia, Ceylon, Hong Kong, Malaya, New Guinea, New Zealand, all of the Asian subcontinent, most of the Middle East, all of East Africa from Egypt to South Africa, a large area of Central West Africa (including Nigeria), Guiana, some of the Caribbean Islands, Ireland and Canada. France's empire comprised a mass of islands in the Pacific and Indian Oceans, as well as the Caribbean (including Madagascar, New Caledonia, Tahiti, and Guadeloupe); all of Indochina; the western half of the African continent from the Mediterranean to the Equator and French Somaliland; and Syria and Lebanon in the Middle East. Belgium, Holland, Spain, Portugal, and Germany also held possessions. 1 MICHAEL TIDY & DONALD LEEMING, A HISTORY OF AFRICA, 110-177 (1980).

Undoubtedly a multiplicity of motives lay behind the colonial enterprise. There were profits to be made,[146] strategic military concerns to be considered,[147] and a sense of power and prestige in empire.[148] The heart of this justification for empire, however, was European racism,[149] which expanded to include a paternalistic civilizing mission[150] "undertaken in the cause of religion and enlightenment."[151] The prevailing cultural ethos allowed people to accept the notion that distant territories and their native peoples *should* be subjugated and that there was an *obligation*[152] to

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The degree of sovereignty retained by the people in these areas seemed to be directly correlated to their race. Thus colonies, which had no international legal personality and over whom authority was plenary, were in Africa and the Melanesian Islands; dominions were much more independent and were typically white countries, such as South Africa and Australia, who both later became League of Nations mandataries themselves; and protectorates, located in the Middle East, were a separate class of territorial entities with a distinct legal personality that did not amount to statehood. Subject to the terms of the agreement, protectorates were assimilated to the protecting state. *See* CRAWFORD, *supra* note 143, at 197; Gordon, *supra* note 1, at 339-43.

146. *See* Mutua, *supra* note 55, at 1126; MARGALITH, *supra* note 106, at 1-2 (stressing the economic motivation in the rivalry for colonies in the "backward" areas of Asia and Africa). Margalith notes that the colonies were viewed primarily as sources for raw materials, and secondarily as markets for manufactured products. *See id.* The African continent offered new cultivable land for food production and provided many of the raw materials needed as a result of the industrial revolution, such as cotton, palm oil, palm kernels, rubber, timber, ivory, hides, and skins. Africa was also favored as a dumping ground for inferior manufactured goods. UMOZURIKE, *supra* note 14, at 18.

147. *See* CHOWDHURI, *supra* note 124, at 1 (explaining colonial territories were potential causes of conflict and were part of the larger struggle for power, authority, and markets).

148. This prestige derived its force from nationalism. EL-AYOUTY, *supra* note 141, at 4; TIDY & LEEMING, *supra* note 145, at 134 (stating "colonies were sometimes established or expanded for reasons of . . . national prestige"); WILSON, *supra* note 126, at 116 (claiming that "in the late 19th century Europe's imperialism was locked in a symbiotic relationship with its intense nationalism").

149. *See* Mutua, *supra* note 55, at 1127.

150. As the nineteenth century unfolded, the social distance between Europeans and Africans widened. In earlier centuries, Europeans "had sometimes been able to deal with black Africans as equals. [But during this period they increasingly] came to perceive of Africans as objects either of exploitation, or of curiosity and compassion." Bull, *supra* note 143, at 100. Moreover, with such inventions as the steamboat and railway, the technological gap between the respective societies widened. *See id.* It was rarely contemplated that Europeans and the indigenous population might "co-exist on terms of mutual respect and equality." UMOZURIKE, *supra* note 14, at 17.

151. Neta C. Crawford, *Decolonization as an International Norm: The Evolution of Practices, Argument, and Beliefs, in* EMERGING NORMS OF JUSTIFIED INTERVENTION 37, 38 (Laura W. Reed & Carl Kaysen eds., 1993).

152. *See* Vincent, *supra* note 126, at 239 (noting that the age of European ascendancy was characterized by concepts of "biological hierarchy among different human types that justified and even required the subjection" of others). "[I]n some accounts of the need for European ascendancy, it was above all race, not religion, or civilization, or mere Europeans, that imposed the duty of empire." *Id.* Race was not, however, the official justification for

rule subordinate, inferior, and less advanced peoples.[153] The vocabulary of the nineteenth century imperium abounded with such words and concepts as inferior or subject races,[154] subordinate peoples, dependency, expansion, and authority.[155]

While the idea of racial inequality is now viewed as racist, such beliefs were presumed to have a scientific basis in the nineteenth century. [156] It was considered

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European empire, rather the imperial mission was to civilize "the non-European populations over which they ruled." *Id.* British grounds for empire included "the idea of trusteeship over backward races, [that were to] . . . be civilized and educated." *Id.* at 240.

153. *See* SAID, *supra* note 23, at 10. Said notes that there was very little domestic resistance to empire, even when its maintenance was costly. He quotes Jules Harmand, a French advocate of colonialism:

> It is necessary then to accept as a principle and point of departure the fact that there is a hierarchy of races and civilizations, and that we belong to the superior race and civilization, still recognizing that while superiority confers rights, it imposes strict obligations in return. The basiclegitimation of conquest over native peoples is the conviction of our superiority, not merely our mechanical, economic, and military superiority, but our moral superiority. Our dignity rests on that quality, and it underlies our right to direct the rest of humanity. Material power is nothing but a means to that end.

Id. at 17.

154. *See* Vincent, *supra* note 126, at 240. Racial superiority was embodied in popular culture as part of European imperialism, and affected the relationship between European settlers and non-European "natives," and between imperial states and their non-European dependencies. *See id.* "In the early 19th century, an intellectual discourse about the 'natural' and 'inherent superiority' of 'white' peoples over 'black' peoples gained popularity and acceptance. . . . Combined with the insular development of international law as the exclusive domain of Christian nations, such discourse served as fodder for states ready to expand for economic reasons; it certainly added to the zealotry for colonization." Mutua, *supra* note 55, at 1127-28.

155. *See* SAID, *supra* note 23, at 15-19.

> The advocates of this discourse . . . declared that Africa had no history prior to direct contact with Europe. Therefore the Africans, having made no history of their own, had clearly made no development of their own. Therefore, they were not properly human, and could not be left to themselves but must be 'led' towards civilization by other peoples: that is, by the peoples of Europe, especially of Western Europe, and most particularly of Britain and France.

BASIL DAVIDSON, AFRICA IN HISTORY xxii (1966). The following early quotation is typical: "generally speaking, [Non-European Africans] still exist in that stage of society which is denominated barbarian; being only elevated above the hunting or savage state by the power of subjecting the lower animals, and by a certain rude agriculture that the fertility of the soil renders productive." HUGH MURRAY, THE CONTINENT OF AFRICA, A NARRATIVE OF DISCOVERY & ADVENTURE 436 (1853).

156. *See* DELIA J. AKELEY, JUNGLE PORTRAITS 3 (1930) (carrying this view into the twentieth century). Akeley notes: "For all of us who belong to civilized worlds, the very simplicity of savage life must always remain its greatest mystery. . . . I honestly tried to view the natives with whom I came in contact as naturally as I viewed the specimens I was collecting for the Brooklyn Institute of Arts and Sciences. This, I feel, is the only way to understand them." *Id.* C.W. HOBLEY, KENYA, FROM CHARTERED COMPANY TO CROWN COLONY 180 (1929) ("The African native, is, I am inclined to think, usually dominated by the impulse of the moment. . . . This outlook on life includes a cheerful and happy disposition, and he usually has a great sense of humor, albeit of a simple character, a saving grace

possible to distinguish and classify hierarchically three clearly marked races: the black, the yellow, and the white.[157] There could not be immediate equality because Europeans and non-Europeans were at "different stages of civilization, and nothing was to be gained by equating the more-advanced with the less-advanced, the superior with the inferior."[158] Indeed, sharp legal distinctions were drawn in colonial legal codes between Europeans and their colonial subjects. Europeans, of course, were accorded a privileged status.

Because the white race was deemed superior, it became the obligation of Europeans to civilize the natives, to take up the white man's burden.[159] As Neta Crawford notes:

> [I]ndigenous inhabitants were viewed by the colonizers as less civilized, less intelligent, and less human than Europeans. Colonialism and all of its constitutive practices . . . were acceptable because the natives were thought to be less deserving than the European settlers. Anyone could see, from the European perspective, that European political, social, and economic organization, not to mention religion, were far superior to those of the indigenous cultures; the clearest evidence was that even though indigenous populations resisted colonialism, the imperialists generally won. Thus colonialism was not only the international norm, it was a regime (rules, norms, and procedures) that codified and reflected the inferior status of the conquered.[160]

Since European cultures, systems of government, administration, law, order, and education were viewed as inherently superior, they invariably became the governing system within the colonies.[161] Thus, although European colonialism

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which helps to counterbalance many defects."); WALTER FITZGERALD, AFRICA: A SOCIAL, ECONOMIC AND POLITICAL GEOGRAPHY OF ITS MAJOR REGIONS 137 (3d. ed. 1940) ("It is agreed that Negro and European Civilizations cannot remain mutually exclusive while existing side by side on the same continent. . . . It seems inevitable that the infinitely weaker civilization of the Negro should ultimately pass away.").

157. *See* Vincent, *supra* note 126, at 241. "[T]he lowest the negro, being hardly more than a mere brute, the yellow race committing none of the strange excesses so common among negroes but tending to mediocrity in everything, and at the top the white race gifted with energetic intelligence, perseverance, an instinct for order, and a love of liberty." *Id.* Later nineteenth-century concepts of social evolution, which were influenced by Darwin's accounts of survival of the fittest in the animal world, were more sophisticated versions of this dogma. *See id.* "The weaker races disappeared before the stronger." *Id.*

158. *See id.* at 249.

159. *See* EL-AYOUTY, *supra* note 141, at 3. The Final Act promulgated at the Berlin Conference included a commitment by colonial powers to preserve indigenous tribes and improve their moral and material well-being. *See* Bull, *supra* note 143, at 110. There was also an obligation to suppress the slave trade and slavery, and to guarantee freedom of conscience and religious toleration. *See id.* These concepts were quickly abandoned, however, in favor of egregious exploitation. *See id.*

160. *See* Crawford, *supra* note 151, at 50.

161. *See* Ibrahim J. Wani, *Cultural Preservation and the Challenges of Diversity and Nationhood: The Dilemma of Indigenous Cultures in Africa*, 59 UMKC L. REV. 611, 618

lasted in Africa for only seventy or so years, "it had a profound impact on indigenous African cultures and institutions."[162]

2. International Law and the Colonial Enterprise

Given the nineteenth century ethos on race and culture and the prevailing positivism of the day,[163] perhaps it is not surprising that international legal principles generally rationalized and supported European colonialism and its underlying precepts and accorded few, if any, rights to the people who were subjected to colonial rule.[164] A clear division of the world into European and non-European realms marked international law, and this division was explicitly based on cultural differences.[165] "International law existed only among the civilized nations of Europe and only European states were fully sovereign[165]. . . . The non-European world became

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(1991). Another reason for utilizing European systems was familiarity with these institutional arrangements. *See id.* Professor Wani notes that European culture was favored to the detriment of traditional African cultures. *See id.* at 619. He also notes the differences between French and English approaches to colonial rule, but concludes that the end result was the same. *See id.* at 619-29.

162. *See id.* at 618. For a brilliant analysis of the difficulties in discerning tradition in the wake of the overlay of European systems, see L. Amede Obiora, *New Skin, Old Wine: (En)gaging Nationalism, Traditionalism and Gender Relations*, 28 INDIANA L. REV. 578 (1995). Several authors, however, believe that the impact on African culture has been minimal. For example, Mazrui and Tidy postulate that the Western impact was inconsequential because African culture is deep. ALI A. MAZRUI & MICHAEL TIDY, NATIONALISM AND NEW STATES IN AFRICA xii (1984). Moreover, contradictions such as Christian charity and capitalist greed; freedom and repression; and equality and racial inferiority also made cultural penetration more difficult. *See id.* Professor Chibundu asserts that in most spheres of life, colonial rule had only marginal effects on the practices and beliefs of the vast majority of the African population living outside the urban centers and their immediate surroundings. *See* Chibundu, *supra* note 46.

163. *See* Anghie, *supra* note 23, at 493 (noting that at the height of colonial expansion in the latter part of the 19th century, positivism was the primary legal philosophy). Thus, international law was based on sovereign will rather than natural law. *See id.*

164. Positivism meant international law reflected state practice, which was to conquer these territories by one means or another. One early treatise discussing the evolving nature of international law to meet new conditions and challenges, noted that many of the rules apply to:

> [R]aces which cannot be said to be Subjects of International Law, but whose welfare is becoming so increasingly the concern of the advanced peoples who constitute the International Family that those peoples are making the protection of the backward races the subject of legal rules which are binding upon and between themselves.

M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW vi (1926).

165. *See* Anghie, *supra* note 23, at 493. This shift replaced "transcendent principles based on religion or reason." *Id.*

166. *See id.* For example Lindley maintains:

> It is, of course, true that International Law has in the main, been evolved out of the mutual relations of the advanced States who are considered to form the International Family. It is equally true that most of its rules are inapplicable to the conditions of backwards peoples.

incorporated into this exclusive legal system only by virtue of its engagement with the European world." [167]

Existing outside of the realm of law, non-Europeans could not legally oppose the sovereign will of European states.[168] Thus, international law owes its origins to European cultural norms which maintained that nations owed duties to others of the same race.[169] "[I]nternational law was a distillation of European cultural norms into a system of rules" [170] and was a product of a European cultural context, norms, and the hope of perpetuating supremacy.[171]

LINDLEY, *supra* note 164, at 46. People of color lacked sovereignty. UMOZURIKE, *supra* note 14, at 19-21; JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 136, 138 (1894) (implying that the "uncivilized" world does not have sovereignty); Robert Williams, *On the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, in* 1990 INDIGENOUS PEOPLE'S RTS. 660, 666-67.

167. *See* Anghie, *supra* note 23, at 494.

168. *See* LINDLEY, *supra* note 164, at 47. Lindley notes the degree to which international law recognized the territorial rights of backward peoples:

> International law should and does recognize the rights of independent backward races to the extent necessary to distinguish those territories to which title may be acquired by the legally and morally legitimate method of Occupation from those which, in the absence of consent on the part of the inhabitants, can be obtained only by Conquest—or through Prescription—it does not, at present go further and say that an acquisition by Conquest is not legitimate. On the contrary, once a Conquest become a [*fait accompli*], International Law recognizes its results.

Id.

169. *See* Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 733 (1993) [hereinafter *Aspiration and Control*]; *see also* Anghie, *supra* note 30; *Robert A. Williams, Encounter on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples's Survival In the World,* 1990 DUKE L. J. 660, 674-5 (describing how international legal scholars did not regard indigenous peoples as civilized members of the western community of nations and thus the titles to their lands were also invalid).

170. *Id.*

171. *See Aspiration and Control, supra* note 169, at 733-34. The discipline ordered the relationship between the European and non-European world by giving content and significance to the boundaries of European culture. *See id.* at 735. Civilization was elevated to the status of a term of art, a legally imperative category. "Civilization" meant "possession in greater or less abundance of such things as palaces, museums, ships, forts, arsenals, arms, ammunition, pictures and jewels." *Id.* Even if not a precise definition, international law reassures the reader that intelligible distinctions between Europeans and non-Europeans could be found. *See id.* At a number of levels this polemic led to:

> [T]he creation of an essentialized and coherent European community defined in dichotomous opposition to the non-European savages. This portrait of European identity demanded the suppression of internal contradictions and differences in favor of a picture of unity around essential characteristics. For example, the concept of statehood built around and reinforced this bounded and essentialized conception of culture. States related to each other as unitary sovereigns while individuals, corporations, communities and tribes had no standing to participate in international legal discourse. The State was an unproblematic stand-in for society because society was a bounded and internally coherent unit that could be represented intelligently by one political structure.

Id at 736.

Thus, in defining the principles of imperial expansion, indigenous peoples generally played a limited role, if any, in the execution of colonial conquest and were denied sovereignty under international law.[172] Legal rationales were found to legitimate the exclusion of non-Europeans in the international system.[173] International legal doctrine sanctioned colonialism, defined as the acquisition of "backward" territory[174] by a recognized state and the imposition of sovereignty over

172. *See* UMOZURIKE, *supra* note 14, at 19. The major legal technique for the imposition of colonialism was the denial of sovereignty to Africans. Early international jurists, such as Bodin (1530-1596) and Gentili (1552-1608) maintained that non-Christian states were sovereign and that international law, derived from natural law, was applicable to all men. Thus, the principal of sovereignty was universally applicable. Similarly, Hugo Grotius (1583-1645) believed that "infidel" rulers were legitimate rulers and masters of their own property. *See id.* at 19-20; LINDLEY, *supra* note 164, at 14. Vattel (1714-1769) on the other hand, did not believe that "infidel" rulers were legitimate. Instead, he "would only allow sovereign rights to backward peoples with limitations or under conditions." *Id.* at 17. While pre-colonial communities were regarded as fully sovereign under international law, in many cases an extensive system of capitulations and concessions was established. CRAWFORD, *supra* note 143, at 176. W. Michael Reisman, *Reflections on State Responsibility For Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231, 236-40 (1989) (discussing treaties concluded between the British Government and various Somali Chiefs in the Horn of Africa). Reisman notes that these treaties were generally violated by the British, and discusses the difficulties entailed in addressing such violations by a superordinating state under international law). Nonetheless, international legal philosophers who denied extending sovereignty to non-Christians had a far greater influence on Europeans in their dealings with non-Europeans. UMOZURIKE, *supra* note 14, at 20; LINDLEY, *supra* note 164, at 24.

173. *See* CRAWFORD, *supra* note 143, at 176. It had to be determined whether communities that were established in a territory, but did not possess a sufficiently coherent and organized government to be termed a sovereign state in European terms, were nonetheless legal occupants of their territory so that the territory could be acquired only by cession or conquest, rather than simply by occupation. Classic international law classified these peoples as legal occupants, but late nineteenth century writers believed that only sovereignty was sufficient to preclude occupation, and Non-European territories did not possess sovereignty. *See supra* notes 140-168 and accompanying text. The Berlin Conference established that African territories could be occupied merely by public notice of annexation or the establishment of protectorate status. CRAWFORD, *supra* note 143, at 178-80. Sufficient authority also had to be established in the territory to protect acquired rights and freedom of trade meaning it was not necessary to consult "the natives." *See id.* This was an improvement on terra nullius, however, which applied if "an unsettled horde of wandering savages, not yet formed into civil society," or in more polite terms, nomadic tribesmen lacking all political organization, were present. *Id.* In such a case, the inhabitants were not regarded as territorial occupants. *See id.* at 180 (quoting WHEATON, ELEMENTS OF INTERNATIONAL LAW, § 2(3), at 54 (3d ed. 1846)).

174. *See* LINDLEY, *supra* note 164, at v. Lindley believed it was impossible to precisely define "backward territory." He noted:

> At the one extreme, it may perhaps be said to be marked by territory which is entirely uninhabited; and it clearly includes territory inhabited by natives as low in the scale of civilization as those of Central Africa. On the other hand, all that can be said as to its upper limits probably is

such a territory.[175] In the case of such territories, rights were acquired through occupation,[176] subjugation,[177] cession,[178] and prescription[179] or through inter-European bilateral treaties.[180] In colonizing Africa, Europeans utilized several of these methods.[181] Wars of conquest and fraudulent treaties with African rulers

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that it is obviously intended to exclude territory which has reached the level of what is sometimes known as European or Western civilization. The term is a relative one, and as civilization advances it may cease to apply to territory which would today be said to be included within it; or it may conceivably become applicable to countries which would not, in the circumstances of the present time, be called backward.

Id.

175. *See* Mutua, *supra* note 55, at 1128.

176. *See id.* Occupation occurred when a recognized state acquired territory which was uninhabited or was inhabited by a people or an entity that international law did not consider a state. Only a state could occupy territory. *See id.* With European settlements, rule by the home state was extended to the settlers. Thus, the Cape of Good Hope fell to the Dutch, Algeria to the French, Angola to the Portuguese and Kenya to the British. UMOZURIKE, *supra* note 14, at 22.

177. *See* UMOZURIKE, *supra* note 14, at 22. Subjugation arose through the conquest of enemy territory in war and its subsequent annexation by the conquering state. The defeated state disappeared into the vanquished state, but title did not vest in the conqueror until annexation was affected. Territories were cleared either for European settlement or to place Africans under European rule. Aggressive wars included those in Algeria, the Kaffir war, the Zulu wars, the Ashanti war and the Maji war. *See id.*

178. *See id.* Cession was the acquisition of territory by a bilateral arrangement where states lost or gained territory by agreement or acquiescence through war. *See id.* "Treaties were concluded with African Kings and Chiefs in which they were forced to surrender their sovereignty or to 'request' European protection. Some territories were bought, but frequently at a trifling cost." *Id.* at 22 (citation omitted).

179. *See* D.P. O'CONNELL, INTERNATIONAL LAW 487 (1965). "Prescription" occurred when a state exercised sovereignty over a territory to which another state had abstract title. Prescriptive claims entailed two elements: an assertion of sovereignty exercised for a long period of time and acquiescence in the claim by the other state. *See id.* at 488. The doctrine did not apply when a colonizing power took possession from a non-state entity because such entities were not themselves sovereign. *See* Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 YALE J. INT' L. 301, 414 (1992); MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES 283 n.149 (1986) (noting that prescription was not used in Africa during the colonial period).

180. *See* Mutua, *supra* note 55, at 1130 n.57 (quoting L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 455 (4th ed. 1928)). In the nineteenth century, European powers entered into treaties with each other recognizing spheres of influence and solidifying claims to territory. For example, the United Kingdom entered into treaties with Portugal (1890), Italy (1891), Germany (1886, 1890), and France (1898).

181. *See* WILLIAM E. HALL, INTERNATIONAL LAW 100 (5th ed. 1904) (noting that in nineteenth century international legal theory, occupation was sufficient because no recognized states existed in Africa). "If those deprived of possession were not states, and consequently did not possess sovereign rights, the territory was *terra nullius* and the acquirer took possession by occupation." Ricciardi, *supra* note 179, at 414 (explaining that the doctrine of prescription was not used in Africa). The concept of *terra nullius* is problematic, however, because many of the entities colonized met the criteria for statehood. Mutua, *su-*

were both means by which to impose European sovereignty.[182] As to "savage, barbarous tribes," there was a right of discovery belonging to civilized and Christian nations;[183] thus, European publicists generally concluded that much of Africa was a no-man's land that could be brought under legal occupation.[184] These territories

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pra note 55, at 1129 (stating that "Most African societies were organized in ethno-political states, some highly centralized, others less so"); *see also* BASIL DAVIDSON, THE SEARCH FOR AFRICA 258 (1994). African Kings and Chiefs were often forced by treaty to surrender their sovereignty or to request European protection. UMOZURIKE, *supra* note 14, at 23.

182. *See* Mutua, *supra* note 55, at 1131-1132 (noting that treaties were overwhelmingly one-sided and were written in the "idiom of jurisprudence prevalent in Europe at the time").

183. *See id.* at 1130. Some states, such as Ethiopia and Liberia, were Christian states, but were not considered "civilized." The qualifications for being subjects of international law were to be white, Christian, and civilized, although the first two were later dropped to include Japan and Turkey, which had demonstrated their military strength. UMOZURIKE, *supra* note 14, at 21. By the latter portion of the nineteenth century, most publicists regarded Africa as *terra nullius* to be occupied by European states. *See id.* at 21. "Primitive" peoples were objects of the law and thus their land, property and person could be possessed by civilized European states. *See id.* Some European publicists categorically denied sovereignty to what were termed "backward peoples." LINDLEY, *supra* note 164. Writing in 1926, Lindley noted that these publicists principally belonged to a comparatively recent period. *See id.* For example, Westlake maintained that the only territorial titles recognized by international law were those held by members of international society, not by "uncivilized nations." WESTLAKE, *supra* note 166, at 136; *see also* HALL, *supra* note 181, at 100 (noting that if a territory was "unappropriated by a civilized or semi-civilized state" it could be acquired through occupation"); 1 L. OPPENHEIM, INTERNATIONAL LAW A TREATISE 276 (1905) (explaining that occupation applied to land which was entirely uninhabited, defining "uninhabited land" to include land "inhabited by natives whose community is not to be considered as a State"); T. J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 143, 151 (6th ed. 1910) (extending the class of "territorium nullius" to all territory not in the possession of states who were members of the family of nations and subjects of international law).

184. *See* Mutua, *supra* note 55, at 1130. Indigenous peoples were deemed barbarians, infidels or sinners, but were not prevented from owning their land, and "did not give the Spaniards a right to occupy their lands." LINDLEY, *supra* note 164, at 12. Vitoria asserted, however, that if the Indians "hindered the preaching of the Gospel, or obstinately refused the Spaniards such natural rights as the right to trade with them and to journey in their lands, the Spaniards, as a last resort, had all the rights of war against the Indians and could take possession of their lands." *Id.* Vitoria also suggested that if the Indians were incapable of forming a state then, in their own interest, the King of Spain might acquire sovereignty over them in order to raise them in the scale of civilization, treating them charitably and not for his person profit. *See id.* Consequently, writers like Vitoria, believed possession required conquest, rather than mere occupation. *See* Anghie, *supra* note 30, at 323-7 (describing how the encounter with non-believing Indians led to a new jurisprudence in international law based on secular natural law).

Whether the acquisition was just was a separate question. Some writers believed that a state could engage in war if the natives would not engage in commerce, or to recover dominions that might be useful to Christendom. Others hypothesized that no nation was authorized by its qualities, notably not by "a higher degree of culture," to take from another nation its property, even if from "savages or nomads." LINDLEY, *supra* note 164, at

were deemed to be occupied by persons who did not belong to the family of states to which international law applied.

The resulting colonies were not separate juridical institutions. Metropolitan governmental authority in these territories was plenary.[185] International law classified such colonies as a part of the metropolitan state;[186] they, therefore, possessed no international personality.[187] Thus, under international law, colonies were nonexistent; all international personality resided in the imperial power. While the move toward international supervision for selected territories accorded them a greater degree of international personality, in some cases, these entities were still classified as part of the metropolitan state that continued to exercise a large measure of international personality on their behalf. The rationale for the supervision of such territories was that these entities were incapable of acting on their own behalf in the international arena.

B. THE MANDATE SYSTEM

The 1919 settlement of the colonial question following World War I[188] introduced the League of Nations Mandate System, which for the first time imposed a

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12, 15 (noting the discussions of various scholars who maintained that peoples regardless of "their degree of barbarism," exercised rights of sovereignty sufficient to render their occupation wrongful).

Lindley summarized these views as follows: "whenever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by Occupation." *Id.* at 17. A second view propounded by publicists gave limited or conditional recognition to the sovereignty of "backwards people" explaining that their territory was to be occupied provided the native did not resist their occupiers with force. *See id.*

185. *See* CRAWFORD, *supra* note 143, at 199. Protected states were an earlier form of subordination. Reisman maintains that although the protected state continued to exist as an international subject, it could not act on its own behalf. *See* Reisman, *supra* note 172, at 233.

186. *See* CRAWFORD, *supra* note 143, at 199. When the U.N. pushed for decolonization, the colonial powers claimed this was an attempt to intervene in their domestic matters. *See* EL-AYOUTY, *supra* note 141, at 32-37; Ruth E. Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond,* 15 MICH. J. INT'L L. 519, 523-25, 530-31, 533-37 (1994).

187. *See* Gordon, *supra* note 1. Publicists distinguished the protectorates of non-Christian nations, including Madagascar, Tunisia, and Zanzibar, from the "so-called protectorates over African tribes." *Id.* The latter were not states and could be legally occupied despite treaties of protection with local rulers. *See* Mutua, *supra* note 55, at 1130. As weak states, non-Christian protectorates had a higher status even though they did not belong to the family of nations. Sovereignty over them could only be acquired through cession or conquest, but not by occupation. Nonetheless, the end result was a loss of sovereignty and the brutal exploitation of human and natural resources. *See id.*

188. *See* SAID, *supra* note 23, at 197 (noting that although World War I had a very limited impact on Western control over colonial territories, these territories furnished Europe with manpower and resources).

form of international control over metropolitan powers with respect to a limited number of territories.[189] The creation of the Mandate System was a normative turning point that embodied a combination of continued colonialism and a foreshadowing of decolonization.[190] Mandates are defined as a "modified form of internationally lawful superordination."[191] The League of Nations Covenant did not outlaw colonialism. Rather, the Covenant strengthened existing law regarding colonial dependencies and provided a firm basis for accepting the new global map.[192] Mandates sanctioned and affirmed the concept of wardship over natives, but the civilizing mission was now to be undertaken by the League of Nations.[193] Mandataries undertook, as a "sacred trust of civilization," to promote the well being and development of those peoples not yet able to stand by themselves under the strenuous conditions of the modern world.[194] Tutelage of such peoples was entrusted to advanced nations which would act as mandataries on behalf of the League.[195] The League, in turn, established the Permanent Mandates Commission

189. *See* William Roger Louis, *The Era of the Mandates System and the Non-European World, in* THE EXPANSION OF INTERNATIONAL SOCIETY 201, 202 (Hedley Bull & Adam Watson eds., 1984) (explaining the Mandate System applied only to the colonies and possessions of Germany, the Ottoman Empire, and Italy). International supervision was chosen over annexation, indicating the beginning of international interest in colonial matters. CHOWDHURI, *supra* note 124, at 22-24.

190. *See* Crawford, *supra* note 151, at 40. Crawford theorizes that because of President Wilson's idealist views regarding self-determination and democracy, it was viewed as unseemly to simply transfer the spoils of war to the victors of the First World War without at least a nod to self-determination. *See id.* Instead of annexation, the Mandate System was a form of international oversight imposed over territories although these territories were still acquired by foreign powers. Thus, mandates dealt with the problem of expanding empires, "without blatantly adopting a policy of [wholesale] annexation." Louis, *supra* note 189, at 202.

191. *See* Reisman, *supra* note 172, at 234.

192. *See* Mutua, *supra* note 55, at 1138. While the system confirmed that mandate territories possessed some of the qualities of international persons, the imperial powers were ultimately accountable for their affairs. *See id.* at 1138-1139; *see also* MARGALITH, *supra* note 106, at 163-170 (describing the debate over sovereignty in the mandate territories, which eventually resolved that these areas were not sovereign states).

193. *See* Anghie, *supra* note 23, at 494-95.

194. *See* LEAGUE OF NATIONS COVENANT art. 22, para.1 *reprinted in* J.A.S. GRENVILLE, THE MAJOR INTERNATIONAL TREATIES, 1914-1945, at 63-64 (1974). Article 22 of the Covenant of the League of Nations provides in part:

> To those colonies and territories . . . which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

Id.

195. *See id.*

> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandataries on behalf of the League.

to exercise some degree of control over the mandataries.[196]

While discussions of international supervision focused on opening mandate areas to commerce and on developing their resources,[197] there was also some acknowledgment that colonialism might result in abuse, pillage, and exploitation.[198] Hence, the civilizing mission was not left to the totally "unfettered discretion of sovereign states"[199] but was undertaken in part by international institutions.[200] Although it recognized the principles of non-annexation and international accountability,[201] the mandate system was not a policy of decolonization,[202] but rather, the

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Id.

196. *See* Reisman, *supra* note 172, at 236 (noting that the Permanent Mandate Commission, which began operating in 1920, along with the Permanent Court of International Justice, supervised the Mandatory System).

197. *See* MARGALITH, *supra* note 106, at 4-5 (quoting C.F. FAYLE, THE GENERAL SETTLEMENT 194 (1915)).

198. *See* Anghie, *supra* note 23, at 494.

199. *Id.; see also* U. O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 27 (1972). Reformers became more critical of the treatment of non-Europeans and advised that it would be beneficial if the natives were in good physical and moral condition. *See id.* For instance, J.A. Hobson believed that "while natives were not to impede the exploitation of natural resources, they were to be well treated with minimal interference in their way of life." *Id.* at 29. The British Labour Party found annexation by force incompatible with socialism and suggested the colonies either have administrative autonomy or participate progressively in local government. *See id.*

200. *See* Anghie, *supra* note 23, at 494; MARGALITH, *supra* note 106, at 5, 7 (noting that African colonies were administered by a trained staff under the auspices of the League of Nations because "it was impracticable in the case of the African colonies to leave the various peoples concerned to settle their own destinies"). The PMC collected reports and advised the Council on mandate subjects. *See id.* at 76 (quoting the League of Nations Covenant, art. 22). Most PMC members acquired their expertise in Africa as administrators, diplomats, or scholars. According to Professor Louis, PMC decisions on issues such as land tenure, commercial monopolies, taxation, justice, and education "set the standard for the entire colonial world as well as the specific mandate territories." Louis, *supra* note 189, at 211. "The mandate system acted as a negative check [of sorts] against economic exploitation and religious discrimination, and the Permanent Mandates Commission insisted on minimum standards of colonial administration. . . . [it] encouraged economic and political progress in order to enable the 'child-like' races of tropical Africa eventually to climb the colonial ladder and become fully developed children of the parent state." *Id.*

201. *See* LEAGUE OF NATIONS COVENANT art. 22. Article 22 was a compromise between President Wilson, who sought trusteeship, and representatives of the British Dominions (such as South Africa, Australia and New Zealand) who sought annexation of South West Africa, New Guinea, and Western Samoa. Arguments in favor of annexation included current possession of these territories, geographic proximity and security considerations made annexation desirable, and that the interests of the "natives" would be best protected under a policy of direct annexation because the Dominions were democracies. The mandate compromise indicated some acceptance of the principles of non-annexation and international accountability, as well as the consent of the governed in the Turkish dependencies. In exchange, the occupying Powers were recognized as mandataries with mandates. In addressing the legal status of Namibia, the International Court of Justice held that whatever the

underlying theme was tutelage.[203] Despite its very limited application,[204] the system was primarily a method to monitor the treatment of the subjects of mandate territories through regular reports to the Mandates Commission.[205]

While there were ethical and strategic aspects[206] to the concept of "sacred trust," the question of race is essential to understanding attitudes of the mandate era.[207] Groups were classified as backwards races in descending categories of civilization:[208] the "A" peoples of the Middle East, who in a relatively short period of

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strong annexation tendencies were at the time, the language contained in the League Covenant precluded annexation. *See* Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 ICJ 3, 30 (Jan. 26) [hereinafter Status of Namibia]. In an earlier case on Namibia, the Court also found that two principles were of paramount importance with regard to these territories: "the principle of non-annexation and the principle that the well-being and development of such peoples form a sacred trust of civilization." International Status of South West Africa, *supra* note 106, at 131.

202. *See* Crawford, *supra* note 151, at 40. For example, the C mandates were regarded as colonies in all but name, and the mandataries expected to keep and eventually permanently integrate these territories into their empires. *See id.* (quoting William Roger Louis, *The Era of the Mandates System and the Non-European World, in* THE EXPANSION OF INTERNATIONAL SOCIETY 201, 212 (1984)).

203. *See* Mutua, *supra* note 55, at 1138.

204. The vast majority of Non-Self Governing Territories were not part of the mandate system.

205. *See* Crawford, *supra* note 151, at 40.

206. *See supra* notes 187-191 and accompanying text. For example, it was generally understood that "[t]he A and C mandates . . . were makeshift solutions, the former to be converted into semi-independent states as soon as possible, [and] the latter to be transformed into permanent acquisitions as soon as international circumstances permitted." Louis, *supra* note 189, at 210. The C mandates, with the exception of Samoa, were regarded as strategic possessions. They were all administered as integral parts of the mandatory power which "possessed complete control over immigration, commerce, and defense policies." Apart from being required to submit annual reports to the League of Nations, the C mandatory powers held their mandate territories as their own territories in all but name. *See id.* at 212. Secret treaties between the allies and others delimited interests in various territories, including German colonies in Africa.

207. *See* Louis, *supra* note 189, at 207.

208. *See* MARGALITH, *supra* note 106, at 27 (noting that Article 22 provide[d] for three distinct types of mandates based upon the development of the peoples, geography, and economic conditions in the mandate areas). This discourse also identified national races, such as the British race. *See* Louis, *supra* note 189, at 207. Japan proposed that the League Covenant embrace racial equality, but such a declaration would have had profound repercussions on the domestic policies of many countries, including American treatment of its black citizens and Australian policy toward aboriginals. These practices militated against its approval. *See* Vincent, *supra* note 126, at 245 (noting that "Hughes of Australia pronounced the theory of racial equality nonsense and President Wilson deemed that the motion failed for want of securing unanimous approval"). The Charter of the United Nations, as compared to the League of Nations Covenant, contains declarations of racial equality. *See id.* at 252; *see also* U.N. CHARTER art. 73 (stating that people lacked self-government,

time would be able to stand alone; the tribal "B" peoples of tropical Africa, who would require an infinite number of years or decades of economic or political advancement under European tutelage; and the "C" primitive peoples of the Pacific, "who probably would remain European subjects at least for a period of centuries, if not forever."[209] The nature of the Mandate varied according to the perceived development of the people.[210]

Class A mandates were the first to achieve nominal independence, although the colonial powers retained a large measure of control over military and foreign policies of these new states.[211] The Class B and C mandates remained in place upon the demise of the League[212] and were expected to be transferred to the trusteeship

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rather than that they lacked the ability for self-government as stated in the League of Nations Covenant).

209. *See* Louis, *supra* note 189, at 201; LEAGUE OF NATIONS COVENANT art. 22, para. 4-6 (describing the developmental stage of the Mandates which were eventually labeled A, B, and C and noting that these "paternalistic distinctions held good for the leaders of the anti-colonial movements as well as for supporters of empire"). The A Mandates included Iraq and Palestine (administered by Great Britain); and Syria (France). The B Mandates were Cameroon (Britain, France); Tanganyika (Britain); and Ruanda-Urundi (Belgium). The C Mandates were South West Africa (South Africa); New Guinea (Australia); Samoa (New Zealand); and the Marshall, Carolines, and Marinas Islands (Japan). *See id.* at 202.

210. *See* Louis, *supra* note 189, at 201. "A" mandates reached a stage of development where their existence as independent nations could be provisionally recognized, subject to administrative advice and assistance by the mandatory until they could stand alone. *See* MARGALITH, *supra* note 106, at 27-28. Mandatories had considerably more powers in B mandates. They were completely responsible for administering territories, subject to specified limitations, such as respecting freedom of conscience and religion. *See id.* Mandataries were urged to take strong measures against various evils and abuses such as trafficking in slaves, liquors, and arms. *See id.* Mandate agreements also dealt with open door policies and provided for equal opportunities for the trade and commerce of all members of the League of Nations. *See id.* Territories such as Southwest Africa and German islands in the Pacific fell into the "C" group. Given their sparse populations or their size, their remoteness from centers of civilization, or their geographical contiguity to the territory of the Mandatory, they were to be governed by the laws of the Mandatory, but subject to the same initiatives that applied to B group mandates. *See id.* at 29.

211. *See* Crawford, *supra* note 151, at 41. On the complex situation surrounding the conclusion of the mandate over Palestine, see for example, CHOWDHURI, *supra* note 124, at 105-112; CRAWFORD, *supra* note 143, at 247 n.2, 340, 426. Many of what Crawford defines as international protectorates were in the Middle East, British protectorates in the Arabian Gulf included Kuwait, Qatar and the Trucial States of Oman (now United Arab Emirates). *See id.* French protectorates included Morocco and Tunisia. *See* PHILLIP C. JESSUP, THE BIRTH OF NATIONS 93, 155 (1974). These states were subject to protectorate agreements which substantially restricted their independence in matters of international relations and the conduct of foreign and internal affairs. *See* CRAWFORD, *supra* note 143, at 196-98. Class A Mandates included Iraq, Lebanon, Palestine, Syria, and Transjordan. *See id.* at 426.

212. CRAWFORD, *supra* note 143, at 337 (noting the "A" Mandates declared independence before the League of Nations dissolved. The "B" and "C" mandates (except Southwest Africa) were transferred to the Trusteeship system. *See id.* at 341. The League of Nations Assembly acknowledged that mandataries would continue to administer their

system under the auspices of the nascent U.N.[213] Thus, there was an overall theme of eventual inclusion and incorporation of "backward" territories into international society.[214] The goal of the civilizing mission was to eventually make mandate territories sovereign. This was to be achieved through the League of Nations.[215] Anghie notes:

> The conquests of the nineteenth century were replaced with the census, education systems, the systematization of land tenure, and the modification of legal systems. Civilization was no longer a vague idea haphazardly introduced in disparate ways by colonial powers within their own territories. Rather it became centralized within the mandate system. Civilization was not so much imposed by force as it was implemented through administrative techniques aimed at making the natives internalize a new social reality and regulate their own behavior accordingly.[215]

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mandates pursuant to the terms of the Mandate agreements until new agreements were reached with United Nations. *See* CHARMIAN E. TOUSSAINT, THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS 46, 47 (1956) (noting that the General Assembly's resolution did not suggest what would happen if new treaties were not concluded). While there were no specific provisions in the League Covenant on termination of mandates, the Permanent Mandates Commission (PMC) believed the system was temporary and formulated conditions for termination. Whether a people had become fit for self-government was a question of fact, not principle, settled by careful observation of the political, social, and economic development of each people. Suggested qualifications to determine self-government included that the territory: (1) have a settled government; (2) be capable of maintaining its territorial integrity and political independence; (3) be able to maintain public peace; (4) have adequate financial resources; and (5) possess laws and a judicial organization which would afford equal and regular justice. *See* CHOWDHURI, *supra* note 124, at 246-7. The International Court of Justice found that the obligation to promote the material and moral well-being and social progress of the inhabitants did not depend on the existence of the League of Nations. Consequently, a mandate could not be ended merely because this supervisory organ ceased to exist. *See* International Status of South West Africa, *supra* note 106, at 133-4.

213. *See* Status of Namibia, *supra* note 201, at 33.

214. *See* Anghie, *supra* note 23, at 496 (noting that it was the exclusion of the non-European world from this society that gave the mandate system its momentum).

215. *See* International Status of South West Africa, *supra* note 106, at 132. The ICJ later noted that the League had assumed a position of supervision and control. *See id.* The mandatory government "was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants." *Id.* The authors of the Covenant believed effective performance of the sacred trust required that the administration of mandated territories should be subject to international supervision. *See id.* at 136. In his separate opinion in the South West Africa Case, Judge McNair noted that in one of the earliest documents on the mandate system, the authority, control, or administration of these dependent territories should be vested in the League, but because joint administration of territories had been found wanting wherever it had been tried, it was preferable that instead of exercising these powers itself, the League should delegate them to a mandatory state. *See id.* at 147 (quoting GENERAL J.C. SMUTS, THE LEAGUE OF NATIONS: A PRACTICAL SUGGESTION (1918), *reprinted in* D. H. MILLER, THE DRAFTING OF THE COVENANT 23-60 (1928)).

216. *See* Anghie, *supra* note 23, at 495-96. For example, the B mandate governing the British mandate of Tanganyika covered such topics as maintaining peace, order, and good

> Thus, the system also required a concept of nation-state against which the development of particular territories could be measured.[217]

Given the underlying premises and structure of the League of Nations Mandate system, it is apparent that international law continued to support the concept of superior and inferior races and cultures and the concept that a system was necessary to elevate certain races and cultures to the European standard of "civilization." The U.N. trusteeship system incorporated many of these doctrines, but the rhetoric and, perhaps, the belief that subordinate peoples might eventually reach this presumed aspiration changed.

C. THE TRUSTEESHIP SYSTEM

At the end of the Second World War, European powers intended to retain their colonial territories permanently.[218] The United Nations Charter continued, and in some respects broadened, the concept of international supervision. It also described aspirational international standards for Non-Self-Governing Territories.[219] The Charter did not proscribe colonialism,[220] and it concomitantly established the

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government; promoting the moral well being and social progress of the inhabitants; freedom of worship and conscience; and the application of general international conventions. *See id.* Other topics included slavery and forced labor, land transfer, natural resource concessions, fiscal and administrative unions with adjacent territories, and the obligation to make annual reports to the Council of the League of Nations concerning measures to apply the provisions of the mandate. *See* British Mandate for East Africa (Tanganyika) *reprinted in* H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 303-06 (1948). Hall states that there was a fundamental assumption that the political and social systems fostered in the mandate territories was the democratic way of life developed in the English speaking world and France. *See id.* at 128 (defining "democratic way of life" to include "liberty of person, opinion, and property; the rule of law; the freedoms of the Magna Carta, the Bill of Rights, and the Rights of Man; and in due course, self-government with self-determination, ending in political partnership with the mandatory state or independence").

217. *See* Anghie, *supra* note 23, at 495 (explaining how "[t]he absensce of sovereignty and the engagement of international institutions . . . created novel practical possibilites" necessitating adoption of the nation-state concept).

218. *See* ADAMS, *supra* note 143, at 47-48. Given the European Powers' greatly weakened power and other changes wrought by the war, however, this became increasingly untenable. *See id.; see also infra* notes 222-230 and accompanying text.

219. *See* ADAMS, *supra* note 143, at 22 (explaining that the inhabitants in mandate and non-self-governing territories played no role in writing the U.N. Charter nor constructing the post-war economic institutions, thus their interests were not considered in forming and shaping these institutions). Of the 43 participating countries at the San Francisco Conference, where the U.N. Charter was drafted, only three were from Africa (Egypt, Ethiopia, and Liberia), five from Asia (India, Iran, Iraq, the Philippines, and China) and 19 from Latin America. *See id.*

220. *See* Mutua, *supra* note 55, at 1139-40 (advocating that the U.N. Charter outlawed colonialism). This assertion is highly doubtful because the validity of colonialism as an institution is not challenged in any of the articles of the Charter. Moreover, no such intent is reflected in the legislative history of the Charter. *See* C.J.R. Dugard, *The Organization of*

trusteeship system[221] to replace and expand upon the mandate system.[222] The relationship of these developments is premised on trusteeship as another form of colonialism.[223] Trusteeship, however, is the model proposed for administering deteriorating states because it guided the territories to self-rule under the auspices of the U.N.[224]

The trusteeship system applied to mandate territories (those detached from enemy states after the Second World War) and territories voluntarily placed in the system by the states responsible for their administration.[225] The system only ap-

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African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism, 16 INT'L & COMP. L.Q. 157, 172-73 (1967) ("The Charter of the United Nations, as framed in 1945, implicitly recognized the legitimacy of colonialism, but in Chapter XI it introduced the principle of international accountability for colonial administrations, for colonial Powers undertook to transmit information concerning their territories to the Secretary-General of the United Nations."). By "imposing the duty of accountability to the U.N. for the administration of colonies, [the U.N.] recognize[d] the legitimacy of colonialism." *Id.* at 172-73 n.86. However, colonialism eventually came to be viewed as contrary to international law and was ultimately deemed contrary to "*jus cogens* rules of self-determination and respect for fundamental human rights." UMOZURIKE, *supra* note 14, at 85; *see also* 1995 (Spec. ed.) U.N.Y.B. 181, U.N. Sales No. E.95.I.50 (emphasis added) (noting the General Assembly's *later* view that decolonization became a legal requirement because the domination and exploitation of people denied fundamental rights contrary to the U.N. Charter).

221. *See* U.N. CHARTER arts. 75-91; GOODRICH & HAMBRO, *supra* note 14, at 232-56; LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 465-78 (3rd ed. 1969) [hereinafter DOCUMENTS] (describing the creation and objectives of the trusteeship system); RUTH RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER, *supra* note 14, at 337-40 (describing the need for total development of dependent areas and the need for the trustees and the inhabitants of the territories to work for the goal of independence).

222. *See* GOODRICH & HAMBRO, *supra* note 14, at 232-35 (describing how the Trusteeship System replaced and expanded the Mandate System); DOCUMENTS, *supra* note 221, at 464-67.

223. *See* TOUSSAINT, *supra* note 212, at 17 (describing the Trusteeship System as "the most comprehensive and recent system of international colonial control"). Only the trust agreement for Somaliland specifically referred to the goals of self-government or independence and established dates to achieve the objectives of Article 76(b). *See also* DOCUMENTS, *supra* note 221, at 470; JAMES N. MURRAY, JR., THE UNITED NATIONS TRUSTEESHIP SYSTEM 216 (1957) (noting trusteeship modified, rather than departed, from the colonial policies of administering states). Moreover, "[n]either mandates nor trusteeships can, quite obviously, be considered as isolated from the general picture of colonialism at any given time." *Id.* at 213.

224. *See* U.N. CHARTER arts. 75-91.

225. *See id.* art. 77. Placing mandate territories under the trusteeship system was not compulsory, rather the Charter makes the system capable of application by means of Trusteeship Agreements. *See id.* at 102; *see also* Clive Parry, *The Legal Nature of The Trusteeship Agreements*, 27 BRIT. Y.B. INT'L L. 164, 164 (1940); U.N. CHARTER arts. 75,77; International Status of South West Africa, *supra* note 106, at 139-40. The Drafters of the Charter were faced with either a consensual system or no system at all. *See* RUSSELL, *supra* note 14,

plied to those territories placed in it pursuant to a trusteeship agreement.[226] Eleven such agreements were concluded.[227]

The progressive development of trust territories toward self-government or independence was an express Charter objective.[228] Unlike article 73b, which applied to Non-Self-Governing Territories aspiring toward self-government, self-government and independence became equal objectives within the trusteeship system.[229] Factors used in determining which objective to pursue included: the

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at 825-26. Nonetheless those mandates which had not achieved independence by the time the League of Nations dissolved (B and C mandates excluding the South African mandate over South West Africa (Namibia)), were placed in the trust system. *See* Status of Namibia, *supra* note 201, at 31. Goodrich and Hambro note that "[w]hile the door [was] open to any Member which possesse[d] a colony to place it by agreement under the trusteeship system, there [could] be no allegation of breach of faith or violation of the spirit of the charter if it refuse[d] to do so." GOODRICH & HAMBRO, *supra* note 14, at 239. While it was hoped that colonial powers would place at least some of their colonies under the trust system, none actually did. *See* UMOZURIKE, *supra* note 199, at 98.

226. *See* DOCUMENTS, *supra* note 221, at 488-92 (noting that trusteeship agreements were concluded between the administering state and the U.N.). For ordinary trust territories, the trust agreement defined the terms of administration and was approved by the General Assembly, whereas the Security Council approved strategic trust territory agreements. *See* CHOWDHURI, *supra* note 124, at 84-85; *see also* Parry, *supra* note 225, at 184 (contending that it may not have been the intent of the drafters of the Charter to make the U.N. a party to these agreements).

227. The following Non-Self Governing Territories were placed within the International Trusteeship System:

Administering Trust Authority	Territory	Agreement Approved	Population by UNGA as of 1938
Australia	New Guinea	December 13, 1946	587,625
Belgium	Ruanda-Urundi	December 13, 1946	3,752,742
France	French Cameroon	December 13, 1946	2,609,508
France	French Togoland	December 13, 1946	370,327
New Zealand	Western Samoa	December 13, 1946	57,759
United Kingdom	British Cameroon	December 13, 1946	857,675
United Kingdom	British Togoland	December 13, 1946	370,327
United Kingdom	Tanganyika	December 13, 1946	5,287,929
United States	Trust Territory of the Pacific Islands	April 2, 1947	121,128
UK, NZ, & Aus.	Nauru	November 1, 1947	3,400
Italy	Italian Somaliland	December 2, 1950	———

HALL, *supra* note 216, at 295. The Trust Territories of the Pacific Islands included the Marshall, Mariana, and the Caroline Islands, which totaled more than 2,100 islands and atolls. WORLD ALMANAC, *supra* note 2, at 683.

228. *See* U.N. CHARTER art. 76(b). Other objectives included promoting the political, economic, social, and educational advancement of the inhabitants. *See id.*

229. *See* GOODRICH & HAMBRO, *supra* note 14, at 235 Article 73(b) entreated Members to cultivate self-government and help the peoples of NSGTs develop free political institutions, but this did not oblige colonial powers to grant independence. *See id.* Colonial powers were obliged only to develop self-government and free institutions which could take the form of independence resulting in severing all political ties with the colonizing state.

specific circumstances of the territory, the freely expressed wishes of the indigenous population, and the terms of the trusteeship agreement.[230] These agreements were more detailed and extensive than Mandate agreements, with more emphasis on gradually cultivating self-government and independence.[231]

Provisions governing the administration of the territories were contained in trusteeship agreements implemented by the administering power.[232] The inhabitants of the territories were not consulted about the terms of these agreements, and during the negotiation process, all parties ignored their objections.[233] The Charter also permitted the administering authority to be more than one state or the U.N. itself.[234]

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230. *See id.*

231. *See* CHOWDHURI, *supra* note 124, at 98 (explaining that the mandate agreements concentrated on prohibiting abuses in such territories).

232. *See id.* at 95 (stating that these agreements constituted the over-arching legal structure that applied to the day-to-day administration of the territories).

233. *See id.* at 83-84. There was considerably more scrutiny by various committees of the U.N. than was the case with mandate agreements. Disagreements arose over private monopolies in the territories, the establishment of military arrangements, whether trust territories could be administered as integral parts of administering authorities, and the termination and revision of agreements. *See id.* at 88-92. For example, Members of the General Assembly generally favored including clauses that would terminate trust arrangements by a certain date, and guaranteed that the trust would be administered for the benefit of the inhabitants, meaning that public property should be returned upon expiration of the trust mandate. *See id.* at 91. The colonial powers resisted such provisos and usually prevailed because the system was consensual, and they could simply pull out if they found the terms too onerous. *See id.* Moreover, it must be noted that despite the additional oversight, it was the United Nations Organization and the administering state that made decisions, not the people of the territory on whose behalf all of the parties purported to act. *See* TOUSSAINT, *supra* note 212, at 203, 78 ("The inhabitants of the trust territories had no hand in choosing the authority that was to administer them, nor in approving the governing trusteeship agreements."). While the United Nations Charter permits any "state directly involved" to participate in the drafting of the agreement, there is no mention of trust territories as a "state directly involved." 1946-47 U.N.Y.B. 186, Sales No. 1947.I.18. The inhabitants did object to the agreements and the methods used to reach them, such as undiscussed drafts. *See* CHOWDHURI, *supra* note 124, at 83 (citing the French draft agreement for Togoland is one such example). There were also objections to "the British drafts which ignored Ewe aspirations towards a united administration." *Id.* Although the West Samoans were consulted, the administering authority did not truly listen to the people given that the draft agreement was processed by the General Assembly while a Convention on the agreement was held in West Samoa. *See id.* at 83-4. Africans "protested against the partition of Togoland and the Cameroon between Britain and France . . . and demanded unification of these territories under the Trusteeship system as [the territories] existed before 1913." *Id.* at 83. Not permitting the participation of the inhabitants led to severe criticisms of portions of proposed trusteeship drafts. *See id.* at 84.

234. *See* U.N. CHARTER art. 81. Proposals that the UN be the trustee were based on the belief that the Organization would be more impartial, have a broader outlook, and the inhabitants would make rapid strides toward self-government. *See* DOCUMENTS, *supra* note

The trusteeship system entailed broader and more effective international supervision than had been the case under the League of Nations Permanent Mandates Commission.[235] The Trusteeship Council, established in 1947,[236] requested information on such matters as developing governmental organs, implementing universal suffrage, training inhabitants for administrative responsibilities, and developing adequate revenue.[237] The Council examined reports from administering powers, considered petitions from the inhabitants,[238] and arranged periodic visits at approximately three-year intervals.[239] Visiting missions from the Trusteeship Council, the General Assembly, and special bodies established to specifically ascertain the wishes of the inhabitants, generally terminated trusteeship agreements.[240]

221, at 501. The mandatory powers unanimously opposed this idea, however, and the U.N. has never been an administering authority. *See* TOUSSAINT, *supra* note 212, at 208. In 1947, the Trusteeship Council drafted a trust agreement for the City of Jerusalem designating the U.N. as the administering authority, with the Trusteeship Council administering the territory on behalf of the U.N. This agreement, however, never entered into force. *See id.*

235. *See* Status of Namibia, *supra* note 201, at 33.

236. *See* CHOWDHURI, *supra* note 124, at 69. The Trusteeship Council was created under Chapter XIII of the Charter as the principle U.N. organ responsible for the trust territories. U.N. CHARTER arts. 86-91. The Council operates under the authority of the General Assembly. *See id.* art. 87. Its membership is comprised of members administering trust territories, the permanent Members of the Security Council, and a sufficient number of additional member states to ensure that the total number of Council Members is equally divided between members that administer trust territories and those which do not. *See id.* art. 86. Given this membership scheme, trust agreements were concluded and approved before the Council was established. GOODRICH & HAMBRO, *supra* note 14, at 252.

237. *See* DOCUMENTS, *supra* note 221, at 470, 535-536; 1946-47 U.N.Y.B. 578, Sales No. 1947.I.18. By 1952 the General Assembly also expected target dates for independence. *See* CHOWDHURI, *supra* note 124, at 248-9.

238. *See* U.N. CHARTER art. 87; UMOZURIKE, *supra* note 199, at 101. According to the administering powers, the right to petition and the creation of visiting missions ensured protection of inhabitants' interests. *See* CHOWDHURI, *supra* note 124, at 243-44. Yet administering powers vehemently opposed representatives from the trust territories taking part in the work of the Trusteeship Council. *See id.* at 240-6. The League Covenant did not discuss the right to petition. *See* International Status of South West Africa, *supra* note 106, at 137. But in 1923, the Council of the League of Nations adopted rules permitting petitions to the League from communities in mandate territories. *See id.* They were to be submitted by the mandatory governments, which could attach any comments they considered desirable. *See id.*

239. *See* UMOZURIKE, *supra* note 199, at 101. These visits were arranged and agreed to ahead of time by the administering states and were usually preceded and followed by intense political activity by the inhabitants. *See id.* A proposal that would have authorized the Trusteeship Council to designate U.N. representatives as liaisons between the U.N., administering authorities and the peoples of the trust territories was opposed by the colonial powers and never adopted. The rationale was to secure communication between U.N. visits, which were brief and at lengthy intervals. *See* CHOWDHURI, *supra* note 124, at 252.

240. By 1975, ten of the eleven trust territories had either (1) achieved the goal of independence or self-government or (2) united with an adjoining territory after a U.N.-sponsored plebiscite. Trusteeships were terminated by an agreement between the General

While administering states had moderately different opinions regarding their trust territories, all shared the underlying assumption that they should bring these territories to a point where they possessed the capability to govern themselves. The Administering Authority, with U.N. oversight, was largely to control this process.[241] The inhabitants, however, gradually gained more control over their daily affairs.[242] Administering states generally modified, rather than departed from, their

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Assembly and the Administering Authority, usually after a U.N. directed plebiscite. *See* CRAWFORD, *supra* note 143, at 341. Given this arrangement, the issue of "states directly concerned" did not arise. DOCUMENTS, *supra* note 221, at 494. Whether the goal of self-government or independence had been reached was determined by the General Assembly or Security Council (for strategic areas), the administering authority, and the "states directly concerned." *See* TOUSSAINT, *supra* note 212, at 135. There were difficulties in determining whether self-government or independence had been achieved because there were few guidelines in the Charter or in the agreements themselves. *See id.* at 136. African trusts were terminated between 1957 and 1962. *See* CRAWFORD, *supra* note 143, at 426-28 (discussing details regarding the achievement of independence by African and other trust territories). From 1975 through the early 1990s, the trust status of the Trust Territory of the Pacific Islands gradually ended. The Northern Mariana Islands voted to become a United States Commonwealth and the three other jurisdictions including the Federated States of Micronesia, the Marshall Islands, and Palau approved association agreements through U.N. plebiscites, that provided "local autonomy while leaving defense responsibilities with the United States." ROBERT E. RIGGS & JACK C. PLANO, THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS 191 (2d ed. 1994); *see also* OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 251 (1995) (explaining the last trust territory, Palau, "became a self-governing territory in free association with the United States" in 1994).

241. *See* 1947-48 U.N.Y.B. 736-37, 750-51, U.N. Sales No. 1947.I.18 (noting that in the early years of the trusteeship system, the inhabitants remained voiceless. If they had positions in government, it was in low level posts that were without much authority). The U.N. stressed the need for education during this period. *See id.* at 738-39, 747-48. Working conditions improved slightly, but not enough to make a true difference in the standard of living. *See id.* at 736, 745-46. Furthermore, the Administering Authorities usually controlled real property and natural resources. *See id.* at 743-45, 751-52. The Administering Authorities in many of the territories continued to use corporal punishment rather than imprisonment. *See id.* at 740, 755. The biggest U.N. effort was to urge Administering Authorities to set a date for independence or self-government. *See* 1956 U.N.Y.B. 338-39, 341-42, 351, 357, 362-63, U.N. Sales No. 1957.I.1. Unfortunately, most Administering Authorities believed that setting a date for independence or self-government hindered development in the Trust Territories. *See id.* at 338, 341, 357.

242. *See* MURRAY, *supra* note 223, at 219-20. As the trusteeship era progressed, the inhabitants gained more power and control over their internal affairs. Economies improved and many Territories had co-operatives of some type to allow more inhabitants to participate in the economy. 1956 U.N.Y.B 336-37, 340, 350, 359, U.N. Sales No. 1957.I.1. Moreover, economic diversification was encouraged and viewed as a means to reach self-government or independence. *See id.* at 340, 359. Small industries also began to develop. *See id.* at 341, 350. The U.N. continued to focus on the need for education and also emphasized improving the status of women. *See id.* at 343, 347, 357. The emphasis on education progressed from primary education to a focus that included the need for secondary and uni-

general colonial policies.[243]

The French envisioned association, rather than assimilation, in Sub-Saharan Africa and sought to create a "gallicized elite among Africans,"[244] which was acculturated to French civilization.[245] These educated individuals were to return to Africa to hold administrative positions, thereby "Africanizing" governmental structures and advancing the French goal of political development toward association. Over the long-term, France also hoped to assimilate the masses and promoted three alternatives for its trust territories: "(1) legal union with France, (2) association with the French Union, or (3) complete independence."[246] Trust policies, however, encouraged adoption of the first two options and discouraged independence.[247]

Paternalism was at the heart of Belgian social and economic trusteeship policies.[248] Although the objective was to civilize the "primitive people," the Belgians did not emulate the French by attempting to turn the indigenous inhabitants into Europeans.[249] Belgium sought to educate the populace about "the fundamentals of morality and the requirements of earning a living in some trade,"[250] without creating a European educated elite.[251]

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versity-level educational opportunities. *See id.* at 337, 341, 347, 350-51, 355, 360, 362. Another focal point of U.N. activity was encouraging universal suffrage and elections in several Trust Territories. *See id.* at 338, 340, 342, 346, 356, 359. By 1956, there were substantial differences between the Trust Territories as some prepared for independence while others failed to progress toward this goal. Political uprisings, such as the 1955 uprising in Cameroon began to occur. *See id.* at 349; *see also* 1959 U.N.Y.B. 353-4, U.N. Sales No. 60.I.1 (concerning problems of violent outbreaks in Ruanda-Urundi). The U.N. quickly condemned uprisings because they reversed political development. *See* 1956 U.N.Y.B 349, U.N. Sales No. 1957.I.1. Peoples of the Trust Territories submitted petitions to the U.N. concerning problems in the Territories, and thus the inhabitants slowly developed a voice on the international stage. *See id.* at 351-52. Additionally, the inhabitants were granted more authority and greater representation in government and as a result slowly began to gain more power. *See id.* at 342, 346, 350, 356, 359, 361.

243. *See* MURRAY, *supra* note 223, at 211-238.

244. *See id.* at 216. The main component of French colonial policy was to create a centralized and uniformly governed empire. Indigenous inhabitants of the colonies would be gradually absorbed into French culture and, in time, become Frenchmen. *See id.*

245. *See id.* at 217.

246. *See id.*

247. *See id.* At the beginning of the trusteeship era, France sought trust association through representation in the Assembly of the French Union or in the French Parliament because local autonomy was not desirable. *See id.*

248. *See* MURRAY, *supra* note 223, at 217.

249. *See id.* Thus in Ruanda-Urundi, Belgium preserved domestic organization that did not interfere with Belgian control of the territory. Western reforms such as voting, which accorded the local population more power, were avoided. *See id.*

250. *See id.*

251. *See id.* at 217-18. This educational policy stemmed from the fear that foreign education created a wave of undue hope among such an elite. The British and French policy, on the other hand, was to educate indigenous elites. *See id.*

British administration was superimposed on local political institutions.[252] The British, in theory, did not destroy local political structures but only sought to "gradually improve them."[253] This policy endeavored to give complete control to local peoples whose territories remained harmonious with British interests.[254] Britain did not try to Anglicize local populations except to the extent it taught them good administration, which entailed Western standards of good government. Social equality was not an aspiration. Rather, the aim in mixed territories was the parallel political development of Europeans, Asians, and Africans without eliminating legal distinctions based on national origin.[255]

It is evident that the Administering Powers remained intent on preparing their charges for civilization. Take for example the following quotation:

> The trusteeship system has not, it is true, been devised in the interests of the administering authority, . . . nor has it been devised as an instrument with which to belabour those governments who have often, at substantial cost to themselves, and with a genuine and encouraging honesty of purpose . . . undertaken the lengthy and laborious task of assisting and guiding the development of a backward people towards enlightened self-government.[256]

While the methods of imposing "civilization" differed among powers in some respects, the underlying premises were in harmony. Despite the intentions of the colonial powers, independence became the ultimate goal.[257] This transformation was undoubtedly due to the changes taking place in the rest of the colonial world.

V. DECOLONIZATION AND DEVELOPMENT

A. DECOLONIZATION

On the eve of the Second World War, nine colonial powers controlled 150 territories that were inhabited by 650 million people.[258] In the ensuing twenty years after World War II, this vast configuration was almost totally dismantled. Professor Crawford proffers several theories to explain the pace and timing of this historic change,[259] including: indigenous efforts toward national liberation,[260] which

252. *See id.* at 218.

253. *See* MURRAY, *supra* note 223, at 218 (noting that the British undertook to harmonize British and African institutions so that their territories could stand on their own).

254. *See id.*

255. *See id.* at 219.

256. *See* CHOWDHURI, *supra* note 124, at 94 (quoting Sir Carl Berendsen of New Zealand).

257. *See* DOCUMENTS, *supra* note 221, at 469-471.

258. *See* EL-AYOUTY, *supra* note 141, at 4.

259. *See* Crawford, *supra* note 151, at 46-48.

260. *See* SAID, *supra* note 23, at 196 (quoting Basil Davidson as noting that "African cultural responses after 1945 were as varied as one might expect from so many peoples and

embraced both peaceful movements by the intelligentsia and guerilla wars for self-determination;[261] the growing and ultimately unsustainable expense of empire;[262] an increasing inability to maintain empire in the face of both movements for liberation and weakened metropolitan economies;[263] a growing distaste for empire among political elites and the mass public within the colonial powers;[264] and a shift

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perceived interests").

261. *See* EL-AYOUTY, *supra* note 141, at 5 (explaining that the Second World War destroyed the myth of white supremacy and exposed the numerous shortcomings of the colonial powers). Colonial powers were defeated or greatly weakened by Nazi Germany and therefore could not protect their colonies. Consequently, contact between rulers and ruled were severed, leaving colonized people to be self-reliant during the war. Nationalist leaders filled the resulting power vacuums in Africa, Asia, and the Middle East. *See id.* Colonial territories also played an active part in the war effort, further exposing colonial inhabitants to other lands, cultures, ideas, and to the imperfections of their rulers. *See id.* Improvements in communication and transportation also meant decreasing isolation. *See id.* at 6. Nationalist intellectuals proclaimed that colonialism was a form of foreign exploitation that embodied the worst form of racial discrimination. *See id.* at 5-6. These leaders were influenced by axis propaganda, concepts of liberty expounded by the Western camp, and communist denunciations of oppression and colonialism. *See id.* Edward Said contends that imperial powers consistently misrepresented that Western concepts of freedom led to the struggle against colonial rule and, consequently, the war against imperialism was one of imperialism's major triumphs. *See* SAID, *supra* note 23, at 199. Said maintains that this view overlooks the cultural reserves that always resisted imperialism. *See id.*

262. *See* El-AYOUTY, *supra* note 141, at 6 (noting that many of the economic and military motives behind colonialism diminished over time). Colonial powers were no longer dependent on the raw materials extracted from their possessions, and new weaponry made the need for colonial military manpower largely obsolete. *See id.* at 7. The greatly weakened economic position of the colonial powers after the war was also a factor. ADAMS, *supra* note 143, at 47-48. During World War II, the U.S. mobilized its industrial resources to support its own war effort, and those of its European allies, through lend-lease and other programs. This support increased the indebtedness of European allies to the U.S. and further reinforced the overwhelming dominant economic and political position of the U.S. in the post-war era. *See id.* at 46.

263. *See* EL-AYOUTY, *supra* note 141, at 6-7; ADAMS, *supra* note 143, at 48-49. The collapse in commodity prices during the depression led to continued economic strain throughout the 1930's and even civil unrest in some instances because wages, employment and income depended on revenues generated by commodity exports. These developments led to increasing dissatisfaction with the status quo and provided "a natural breeding ground for political agitation and anti-colonial nationalism." *See* ADAMS, *supra* note 143, at 48-49. Adams suggests that the military weakness of France and Britain during the 1956 Suez crisis also demonstrated that these powers were no longer able to operate as great powers in the colonial world. *See id.* at 51-52.

264. *See* SAID, *supra* note 23, at 199-200, 276 (noting that "[w]ithout metropolitan doubts and opposition, the characters, idiom and very structure of native resistance to imperialism would have been different"). Said argues that "[j]ust as culture may predispose and actively prepare one society for the overseas domination of another, it may also prepare that society to relinquish or modify the idea of overseas domination." *Id.* at 199-200. Others view decolonization as a policy reached unilaterally by colonial powers, however:

> Decolonization suddenly became the settled policy of the British, the French, and the Belgians, a

in opinion and international norms, regarding the legitimacy of colonialism among non-colonial powers.[265] The anti-imperial struggle "was universalized and the rift between Western (white, European, advanced) and non-Western (colored, native, underdeveloped) cultures and peoples was dramatized."[266] Demands for universal democracy, human rights, and self-determination emerged in the U.N. era, forcing international law to address these issues in order to remain relevant.[267]

Although the U.N. Charter did not espouse decolonization, it included a chapter on Non-Self Governing Territories (NSGTs),[268] pertaining to colonial territories

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policy precipitately and thoroughly applied whatever the costs and the consequences. The policy was, by and large, the outcome of a unilateral decision taken by the metropolitan authorities, rather than a response to some overwhelming or irresistible pressure exerted by the African populations. The decision was based on a judgement [sic] about the worth to the metropolitan countries of administering these colonies. It was taken in the light of assumptions about the future tendencies of world politics, of the world balance of power, and of the manner in which this balance—military as well as political—would be affected by the metropolitan countries relinquishing control over Africa.

Elie Kedourie, *A New International Disorder, in* THE EXPANSION OF INTERNATIONAL SOCIETY 347, 351-2 (Hedley Bull & Adam Watson eds., 1984).

Finally, if racial attitudes were an element in the age of European ascendancy, they also accompanied its passing. The seriousness with which Europeans took their supposedly incomparable genetic endowments at the zenith of imperial enthusiasm in the late nineteenth century meant that when they realized their own mortality, the shock was more severe. *See* Vincent, *supra* note 126, at 240.

265. *See* Lam, *supra* note 33, at 615 (discussing how the Soviet Union supported decolonization, which also became imperative to the Third World/Socialist majority voting block that eventually coalesced at the U.N. after World War II). There were also emerging demands for universal democracy, human rights, and self-determination. *See* Anghie, *supra* note 23, at 496. The United States was unwilling to lend military support to maintain exclusivist colonial regimes. *See* ADAMS, *supra* note 143, at 53. Continued European control over colonial possessions in Africa and Asia would have denied America access to trade and investment opportunities and the exploitation of raw materials abundant in the colonies. *See id.* at 48. Decolonization was also due in part to cold war imperatives; Moscow's strong condemnation of colonialism and its support for radical movements encouraged Western powers to bring the colonial era to a close. *See* Fred Halliday, *The Third World and the End of the Cold War*, 33, 37, *in* GLOBAL CHANGE, REGIONAL RESPONSE THE NEW INTERNATIONAL CONTEXT OF DEVELOPMENT (Stallings, ed.).

266. *See* SAID, *supra* note 23, at 199. Thus there were Pan-African, Pan-Arab, and Pan-Asian Congresses, as well as solidarity conferences such as the Bandung Afro-Asian Solidarity Conference in 1955 where African leaders met with leaders from Asian states that also experienced European colonialism and faced similar problems of colonialism and racism. ADAMS, *supra* note 143, at 51.

267. *See* Anghie, *supra* note 23, at 498. This trend eventually led to decolonization and the admission of non-European states into international society. *See id.* Five African colonies achieved independence between 1956 and 1958, sixteen in 1960, and another seven by 1962. *See* ADAMS, *supra* note 143, at 52.

268. *See* U.N. CHARTER arts. 73-74. NSGTs were "territories whose peoples had not yet attained a full measure of self-government." *Id.* art. 73. Chowdhuri maintains that the term NSGT "implie[d] a curious admixture of historical, juridical, sociological, political and economic realities which [was] the product of the incoherence of the dependent world."

administered by U.N. members.[269] The Charter signified the first time that international obligations were proclaimed concerning colonial territories, and their administration was narrowly brought within the purview of the international community.[270] Chapter XI imposed, as a "sacred trust," an obligation to promote the well being of colonial inhabitants and to ensure their political, economic, social, and educational advancement. It also provided for their just treatment, protection against abuse, and progressive development of free political institutions.[271]

CHOWDHURI, *supra* note 124, at 6. Because "full measure of self-government" could not be defined, the term NSGT was interpreted in several ways. *Id.* at 4. According to the Belgian government, the term NSGT was applicable to "distinct ethnic groups representing a less advanced civilization than the administering Power." *Id.* NSGT was also viewed as "synonymous with [a] 'colony' inhabited by peoples of a different race, language and culture from that of the peoples of the Powers who rule[d] them." *Id.* There were two distinctive features in all NSGT's of this type. The first feature was a non-homogeneous social structure. The inhabitants and rulers did not form a society united on a common basis, rather they belonged to different races, countries, religions, and environments, both geographical and psychological. *See id.* These societies were the product of two diverse courses of history and their respective inspirations, goals, and aspirations were viewed as continual contrasts. *See id.* The second feature was that dependent communities lived under non-indigenous governments, which were foreign to the great mass of the population. Outside sources held supreme control of the destinies of these countries. *See* CHOWDHURI, *supra* note 124, at 4 (quoting F. M. BARON VAN ASBECK, LE RÉGIME DES ÉTRANGERS DANS LES COLONIES, RECUEIL DES COURS 5-7 (1937)). Both interpretations emphasized that the peoples of the colonies were "the other," that was at best different, if not simply subordinate or inferior. Thus, even where inferiority was not explicitly declared, it was implied since one group was entitled to rule and dominate the other. Chowdhuri settled on the following definition of NSGTs: "a territorial unit, geographically separated from the metropolitan country, and occupying a subordinate political and economic status which has been unilaterally determined by the Powers concerned without the consent of the freely expressed wishes of its people." *Id.* at 5-6.

269. *See* U.N. CHARTER arts. 73-74. This article applied to the vast majority of NSGTs because relatively few came within the Article 77 definition of trust territories, and no colonial possessions other than mandates were voluntarily placed in the trusteeship system.

270. *See* Frank Abdulah, *The Right of Decolonization*, *in* THE FUTURE OF INTERNATIONAL LAW 1205, 1206.

271. *See* U.N. CHARTER art. 73. *But see* ADAMS, *supra* note 143, at 50 (explaining that this language is patronizing). Yet Article 73 was the legal vehicle utilized to push for more rapid decolonization until the 1960 adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc A/4684 (1960). Reports submitted pursuant to Article 73 were for informational purposes only, and there was no criteria to determine when a NSGTs attained self-government. Nor were there procedures to monitor colonial power compliance. *See* Abdulah, *supra* note 270, at 1206. Consequently, there were disagreements regarding the obligation to convey information, the type of information to be transmitted, and the use of collected material. There were also debates on which territories should be termed NSGTs. In 1959, the General Assembly decided that, prima facie, there was an obligation to transmit information about a territory which was geographically separate and distinct, ethnically and/or culturally, from the state administering it. *See id.* (citing *Principles Which Should*

Chapter XI was non-binding and embodied aspirations rather than legal obligations.[272] It only obligated imperial powers to develop self-government,[273] rather than giving colonial peoples the right to realize political independence. The Chapter XI strategy as employed in Africa, suggested a leisurely approach to political change in the colonies.[274] Nonetheless, Chapter XI was wielded as a legal tool within the U.N. to push for decolonization. Despite the initial intention of its drafters, Chapter XI became quite relevant in the struggle against colonialism.

While the League of Nations Covenant did not refer to racial equality,[275] the U.N. Charter affirms respect for human rights and fundamental freedoms without distinctions as to race, sex, language, or religion.[276] Principles of equality, including racial equality, became part of the international legal discourse.[277] Racial equality as orthodoxy, however, did not lead to its uniform acceptance in international society, nor to its universal realization.[278] Equality was part of the official

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Guide Members in Determining Whether or Not an Obligation Exists to Transmit Information Called for Under Article 73(e) of the Charter, G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16., U.N. Doc. A/4651 (1960)). NSGTs achieved independence by three methods: (1) emergence as a sovereign independent state, (2) free association with an independent state, and (3) integration with an independent state. The decision was reached by ascertaining the preferences of the territory's people through an impartial democratic process based on universal suffrage. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

272. *See* Russell, *supra* note 14, at 819-20 (noting Chapter XI is the only Chapter in the U.N. Charter that is a declaration and was apparently meant to be voluntary); *cf.* Reisman, *supra* note 172, at 236-37.

273. *See* ANTONIO CASSESE, SELF DETERMINATION OF PEOPLES 42 (1995). The language of Article 76 of the Charter, which applied to trust territories, contemplated progressive development toward self-government or independence, indicating that the terms self-government and independence were not synonymous. *See id.*

274. *See* ADAMS, *supra* note 143, at 50. For example, the British planned to consolidate white rule in colonies with large white settler populations and to eventually turn over total political power to those whites. In colonies without significant white communities, the intent was to build a "coterie of native political and administrative cadres on whom appropriate doses of self-government could devolve." *Id.* at 51. This is yet another example of the general conviction that native peoples were incompetent and thus, only capable of slowly acquiring some measure of self-government, while whites would soon be accorded full political rights and would be entitled to rule native peoples.

275. *See supra* notes 191-99, 207 and accompanying text.

276. *See* U.N. CHARTER arts. 1(3), 55, 76(c). This change in perspective may have stemmed in part from the atrocities committed by Nazi Germany during World War II, actions which were based on notions of racial superiority. *See* Vincent, *supra* note 126, at 252. The emergence of two anti-colonial powers, the United States and the Soviet Union as hegemons undoubtedly had some impact, although their anti-colonialist views did not necessarily stem from a belief in racial equality. *See id.*

277. *See* Vincent, *supra* note 126, at 252.

278. The uneven acceptance of such doctrines should not be a surprise, for the racism of imperialism varied somewhat with time and place. French ideas about integration, for example, differed from the British model of indirect rule. Nehru saw the independence move-

canon and inspired non-Europeans to demonstrate that they were the equals of Europeans, while also precipitating a desire to be different.[279] Indeed, Third World Liberation struggles were a part of the rising demands for inclusion in a world community whose dominant powers perceived them as "other," "object," "marginal," "inferior," and "subordinate."[280] Hence, the question is the extent to which the official dogma referred to reality.

Much of the resistance to colonialism was conducted under the banner of nationalism,[281] and these movements adopted many of the precepts of European nationalism. Nationalist movements were usually led by the national bourgeoisie and specialized elites who, to a great extent, were the products of colonialism.[282] The

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ment as a national, rather than a racial movement. Racial rhetoric played a more prominent part in the African independence movements. *See* Vincent, *supra* note 126, at 252 ("The search for an African personality reflect[ed] the quest for dignity of a race that had always been at the bottom of the European list."). Racial discrimination and segregation in the United States received increasing attention after the Second World War. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988). Given the United States' objective of promoting democracy and the ideological battle against communism, racial segregation became increasingly embarrassing. *See id.* at 62-63. Thus, by driving the federal government to adopt a pro-civil rights stance, the war against communism may have contributed to the success of the civil rights movement in the United States *See id.* at 62-67.

279. *See* Vincent, *supra* note 126, at 250 (noting that the insistence of Europeans on their essential European nature, may have led Asians to respond with a common feeling of an essential Asian nature; similarly Africans celebrated negritude and searched for an African personality). " 'We are as good as you,' [became] 'we are different from you and we do not necessarily have the same values as you.'" *Id.* Equality, as interpreted in an African context, came to mean that races "have the right to decide for themselves who is to belong to the separate units and the institutions that will rule them." Racial equality came to mean preserving the integrity of a race, a doctrine that was alarming in the hands of colonialists, but was less so when deployed in the defense of the subordinated. *See id.* Such concepts as "negritude" proclaimed that there was an African personality, personifying the distinct cultural values of the black world. *See* Leopold Sedar Senghor, *Negritude: A Humanism of the Twentieth Century, in* COLONIAL DISCOURSE AND POST-COLONIAL THEORY 27-35 (Patrick Williams & Lauren Chrisman eds., 1994).

280. *See* Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751, 764 (1992). Second world resistance to communist and capitalist imperialism and first world domestic struggles for freedom and equality were also part of this rising chorus. *See id.*

281. *See* SAID, *supra* note 23, at 223. Said defines "nationalism" as the mobilizing force that coalesced into resistance against alien occupying empires by peoples with a common history, language and religion. *See id. But see* NATIONALISM 4-5 (John Hutchison & Anthony Smith eds.) (noting that nationalism is a difficult concept to define, although its main themes have been "autonomy, unity and identity"). Nationalism encompassed liberation from external constraints (namely from European colonial powers), a sense of unity by dissolving internal divisions, and legal equality represented by a single culture in a homeland. *See id.* at 4.

282. *See* SAID, *supra* note 23, at 223; *see also* BASIL DAVIDSON, LET FREEDOM COME 209 (1978) (discussing a "modernizing elite" among Africans and the influence of Western

leaders and members of the nationalist organizations that spearheaded the thrust toward independence often led newly independent governments. [283] These leaders were usually educated in the West and supported in government positions by the former colonial powers.[284] Consequently, there was a strong tendency to replace discarded colonial administrations with class-based and ultimately exploitative structures, which replicated the old colonial configurations.[285] Thus, even as decolonization represented a step toward African self-determination, the government Africans chose to adopt replicated Western modes of governance,[225] which were accepted as appropriate and necessary even as colonialists themselves were rejected.[287] Western political systems were adopted with little deference to internal cultural values.

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cultures, particularly the United States); DAVIDSON, *supra* note 181, at 258 ("To the Western-educated few, nationalism on the European model acquired the status of manifest destiny"); KWAME NKRUMAH, REVOLUTIONARY PATH 38 (1973) (viewing the development of a colonial intelligentsia as one of the inevitable results of imperialism). Most nationalist movements have been founded and inspired by intellectuals. *See* HUTCHINSON, *supra* note 281, at 5.

283. *See* JULIUS K. NYERERE, FREEDOM AND UNITY 106 (1973), stating:

> The same nationalist movement, having united the people and led them to independence, must inevitably form the first Government of the new state; it could hardly be expected that a united country should halt mid-stream and voluntarily divide itself into opposing political groups just for the sake of conforming to what I have called the 'Anglo-Saxon form of democracy' at the moment of independence.

Id.

284. *See* CLAUDE AKE, DEMOCRACY AND DEVELOPMENT IN AFRICA 3-4 (1996); JOHN D. HARGREAVES, DECOLONIZATION IN AFRICA 108, 109 (1988) (describing the need to educate inhabitants to be leaders); MAZRUI & TIDY, *supra* note 162, at 31 ("Western education affected an elite minority which led the emerging nationalist political movements."); MURRAY, *supra* note 223, at 217, 218 (describing the reasons why Britain and France encouraged Western education for some members of their trust territories and why Belgium opposed this educational plan).

285. *See* SAID, *supra* note 23, at 223 (noting that imperialism claimed to be an educational movement that set out to modernize, instruct, and civilize, but over time it established modernizing trends which muted the harsher aspects of imperialist domination while still preserving the nineteenth century divide between native and Westerner). Colonial schools taught the native bourgeoisie the history of France or Britain, which demoted native history. *See id.*

286. *See* AKE, *supra* note 284, at 10; *see also* DAVIDSON, *supra* note 181, at 251 (quoting Nigerian economist and reformer, Jigeria I. Ode *in Bulletin,* AFRICAN CENTRE FOR DEVELOPMENT AND STRATEGIC STUDIES [ACDESS] 8 (1992)) "[W]hen the opportunity came to cast aside the yoke of colonialism, no effort was made to reassert Africa's self-determination by replacing the inherited foreign institutions . . . and the flawed European models of nation-states." *Id.*

287. See NYERERE, *supra* note 283, at 188-194; DAVIDSON, *supra* note 25, at 106, 168; DAVIDSON, *supra* note 181, at 250, 258.

B. THE DEVELOPMENT DISCOURSE

Post-Colonial theories of development continued the trend of replicating Western paradigms.[288] Racial terms were omitted, but the discourse of subordination continued under the guise of "development." The theories of modernization, elaborated after World War II, largely reflected the ideological hegemony of Western capitalism.[289] Accordingly, what emerged was "development as an evolutionary movement from an original state of underdevelopment to an idealized version of the United States or Western Europe."[290]

Thus, despite some shift in thinking by Western powers, many underlying assumptions remained the same. Developing Western style institutions and governing bodies remained the primary objectives.[291] African nations were expected to "develop" in an effort to attain the technology and living standards of the West.[292]

Prior to the Second World War, the West equated development with progress for Africa, and Europeans were the "agents of change and the chosen standard-bearers."[293] During the Cold War, the West equated development with "moderni-

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288. Perhaps there is a need to think about the terms "development," "developing" and "underdeveloped." Do they not indicate some kind of hierarchy, and is that hierarchy based solely on economic development or industrialization? Perhaps. We certainly do not refer to Japan, South Korea, or Singapore as developing countries. Japan is firmly in the industrialized First World, while Singapore and Korea are Newly Industrialized Countries (NICs). There are few non-industrialized white countries, although there are several relatively poor ones, such as Ireland, Portugal, and some eastern European nations. A book on the Third World, GLOBAL RIFT by L. S. STAVRIANOS, begins by describing the role of Eastern Europe in the global system.

289. *See* Paul Krugman, *Cycles of Conventional Wisdom on Economic Development*, 71 INT'L AFF. 717 (1995) (discussing the changing and ultimately unreliable theories of development).

290. Francis G. Snyder, *Law and Development in Light of Dependency Theory*, 14 L. & SOC'Y REV. 723, 726 (1980).

> 1. Development means advancement towards certain well-defined general objectives which correspond to the specific condition of man and society to be found in the most advanced societies of the modern world.
>
> 2. Underdeveloped countries will progress towards this model as soon as they have eliminated certain social, political, cultural and institutional obstacles.
>
> 3. Certain economic, political and psychological processes can be singled out as allowing the most rational mobilization of national resources and these can be categorized for the use of economic planners.
>
> 4. To all this is added the need to co-ordinate certain social and political forces in support of a development policy and to devise an ideological basis which organizes the will of various nations in the "tasks" of development.

Id. (quoting dependency theorist, Theotonio Dos Santos) (omissions in original).

291. *See* AKE, *supra* note 284, at 10 (1996). DAVIDSON, *supra* note 25, at 197-209. Crawford Young, *Democratization in Africa: The Contradictions of a Political Imperative*, *in* ECONOMIC CHANGE AND POLITICAL LIBERALIZATION IN SUB-SAHARAN AFRICA 230, 234 (Jennifer A. Widner ed., 1994).

292. *See* Chopra, *supra* note 9, at 15.

293. *See id.* (noting that Europeans were the standard toward which progress was di-

zation," which amounted to "Westernization."[294] Development was to be achieved via international aid, which was often greatly influenced by strategic, ideological battles.[295] In the post-Cold War era, capitalism and democracy emerged as the paradigms of development.[296] Although the jargon has changed, the models advocated continue to represent Western modernization[297] ideologies, which the South (Third World) must adopt and against which its progress will be judged. The underlying assumption remains that the West[298] exemplifies development and, thus, is the ultimate arbiter of which counties have "developed."

For the most part, the African post-colonial state assumed the contours of the previous colonial state.[299] Once in power, the newly installed African leaders[300] adopted development policies similar to those proposed by colonial powers after World War II.[301] Their strategies advocated modernization and conversion to European-style economies.[302] African leaders also argued that their countries must produce wealth before it could be redistributed.[303] Further, they insisted that unity was the precursor to development, and, thus, the pursuit of development often provided an excuse to silence opposition and further entrench those in power.[304]

Yet, Western-fashioned development plans for post-colonial Africa often failed to account for African social or cultural realities.[305] Rather, the emphasis was on

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rected, as well as the means of getting there).

294. *See id.* (explaining that the terms which the Western powers used to describe colonization emphasized both aspects of development: "for the French it was une mission civilisatrice; for the British, a White Man's Burden; and for the United States, Manifest Destiny").

295. *See id.* at 18 (stating that throughout the Cold War assistance was used as a strategic tool, and ideological differences permeated development aid). The United States advocated capitalism as the path to development while the Soviet Union promoted communism. *See id.; see also* Halliday, *supra* note 265, at 39-42.

296. *See* Chibundu, *supra* note 46; THOMAS BIERSTEKER, THE "TRIUMPH" OF LIBERAL ECONOMIC IDEAS IN THE DEVELOPING WORLD (Global Studies Research Program, Univ. of Wis.-Madison Working Paper Series No. 6, 1993) (discussing predominance of liberal market-economy discourse in the post-Cold war era and appealing to development scholars to evaluate which aspects of the discourse are most helpful).

297. *See* Chopra, *supra* note 9, at 15-16.

298. *See* Halliday, *supra* note 265, at 36 (noting the term "Third World" originated in the late 1950s to denote a group of countries that were distinct from the capitalist "First World" and communist "Second World"). Today, the "West" is often called the North as opposed to Third World "South" countries. *See id.*

299. *See* YOUNG, *supra* note 37, at 9. Chibundu, *supra* note 46.

300. *See* AKE, *supra* note 284, at 3-4.

301. *See* Young, *supra* note 291, at 231.

302. *See id.; see also* AKE, *supra* note 284, at 9-10; DAVIDSON, *supra* note 25, at 199-200, 216.

303. *See* AKE, *supra* note 284, at 9. Young, *supra* note 291, at 231.

304. *See* AKE, *supra* note 284, at 9 (explaining that development may have become secondary to establishing a power base); Young, *supra* note 291, at 235.

305. *See* AKE, *supra* note 284, at 9-10. There was little belief that African peasant society had any developmental potential. *See* DAVIDSON, *supra* note 25, at 198. For example, it

modernization, which is equated with Westernization. If social or cultural realities in Africa failed to accommodate Westernization, then those realities had to be altered.[306] Development theories also failed to integrate indigenous political or social institutions. Thus, only economic development was considered, not ways in which changes in governing structures might affect economic development.[307] Not only did development plans fail to integrate or account for African societies, many social scientists believed that however unfortunate colonization had been, it made rapid development possible because institutions could be completely reconstructed, presumably in the image of the West.[308]

Law and development scholars prescribed institutionalizing the rule of law to encourage investment from the West and to facilitate the development of an efficient economy.[309] A general belief that a Western rule of law, based on Western institutions and government, will bring desired Western-style success permeates discussions of Third World development.[310] Strategies to develop law or institutions rarely consider the cultural setting of the targeted country.[311] Those advocating the rule of law as a means of ensuring accountability often fail to recognize that accountability in non-Western societies may take different forms.[312] Thus, decolonization and development continue to perpetrate any of the underlying premises of colonialism, albeit in a different form and with different rhetoric.

VI. CRITICALLY APPRAISING MODERN TRUSTEESHIP

Having examined the historical and cultural context surrounding colonialism in its various forms, the next step is to evaluate trusteeship in the modern era. Because the West views certain peoples as different and perhaps inferior, solutions that would never be appropriate for sovereign industrialized democracies somehow become suitable and acceptable for these very different beings.[313] Thus, a system

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was not until the 1980s that those charged with development policy began to think that perhaps African farmers might know more about farming in Africa than westerners did. *See id.* at 217-218.

306. *See* AKE, *supra* note 284, at 9-10.

307. *See id.* at 12-13.

308. *See* DAVIDSON, *supra* note 25, at 199-200.

309. *See* Chibundu, *supra* note 46, at 50, 53 (noting that examples of model rules of law came from Western societies).

310. *See id.* at 63-64.

311. *See id.* at 65-66.

312. *See id.* at 75-76, 89. Social scientists posit that African relationships and accountability are based on "reciprocity," encompassing exchanges based on trust and need, rather than market values. *See id.* at 89-90. Thus, perhaps the focus should shift to assuring accountability when different cultural values are at stake.

313. *See* EDWARD SAID, ORIENTALISM 97 (Vintage Books 1979) (1978) (quoting Anwar Abdel Malek, *Orientalism in Crisis*, 44 DIOGENES 107-08 (Winter 1963)). Said defines "the other" in discussing the "Orient":

> [T]he Orient and Orientals [are] an "object" of study, stamped with an otherness—as all that is different, whether it be "subject" or "object"—but of a constitutive otherness, of an essentialist character. . . . This "object" of study will be, as is customary, passive, non-participating, en-

that is firmly grounded in racism and cultural inferiority is a possible solution in the late twentieth century, where democracy now supposedly reigns.

The concept of "otherness" stems from a distinct Western cultural and racial motif,[314] which is also the perspective that continues to shape and dominate the construction and implementation of international law.[315] Western legal theory views law as an autonomous, abstract, and rational entity distinct from the society it regulates.[316] Law is presumed universally applicable and objective.[317] Consequently, international legal theory generally fails to take account of or acknowledge its underlying paradigms of racial and cultural inferiority. Yet for most of its history, international law explicitly excluded non-Christians and non-Europeans from its purview.[318]

Contemporary doctrine and rhetoric proclaim racial and cultural equality.[319] With decolonization and the emergence of numerous new nation-states, most human beings have been formally admitted to the international system and are beneficiaries of the accompanying rights, duties, and obligations that emanate from this

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dowed with a "historical" subjectivity, above all, non-active, non-autonomous, non-sovereign with regard to itself: the only Orient or Oriental or "subject" which could be admitted, at the extreme limit, is the alienated being, philosophically, that is, other than itself in relationship to itself, posed, understood, defined—and acted—by others.

Id.; *see also* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 140 (1987) (noting that "[v]ery little in our language or our culture encourages or reinforces any attempt to look at others as part of ourselves").

314. *See* FRANTZ FANON, THE WRETCHED OF THE EARTH 212 (1963); Anghie, *supra* note 23, at 447.

315. *See Aspiration and Control*, *supra* note 169, at 728-29, 732-33, 735-37 (1993). This is especially true in the post Cold War era because Western democracy and capitalism won the international ideological battle, meaning the last remaining super power can essentially impose its ideological and cultural will.

316. *See* Charlesworth, *supra* note 18, at 613; David Kairys, *Introduction*, *in* THE POLITICS OF LAW 1, 2 (David Kairys ed., 1990).

317. *See* Charlesworth, *supra* note 18, at 613.

318. *See* Anghie, *supra* note 23, at 498 n.279 (noting that Vitoria and Gess provide the "native" with just enough sovereignty to make international law binding on him); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 222 (1986) (arguing that "white man's law denies respect to the vision of the American Indian.").

319. *See* U.N. CHARTER art. 1, para. 2, 3; art. 2, para. 1; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3; Universal Declaration of Human Rights, G.A. Res. 217A, art. 1, 2, U.N. Doc. A/810 (1948); *see also* Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 386 (1991) (discussing whether human rights are examples of cultural relativism and explaining that "[t]he international community should generate only those minimum elements necessary to satisfy the values reflected in each right").

system.[320] Yet, this inclusion has been on Western terms[321] and has been unequal; many emerging states have found it nearly impossible to adhere to the Western model.[322] The international system fails to permit non-western ways of existence, conceiving, or believing. People must organize themselves into nation-states, thereby conforming to the prevailing system if they are to participate in the international system.[323] Alternative systems simply have not been considered,[324] nor are they contemplated now if the intention is to resurrect the colonial past.

Having "failed" to live up to the Western construct of the nation-state, the in-

320. There are still Non-Self Governing Territories, indigenous peoples, and others who do not fully represent themselves in the international system. Current Non-Self Governing Territories include: American Samoa; Anguilla; Bermuda; British Virgin Islands; Cayman Islands; East Timor; Falkland Islands (Malvinas); Gibraltar; Guam; Montserrat; Pitcairn; St. Helena; Tokelau; Turks and Caicos Islands; United States Virgin Islands; Western Sahara. *See International Trusteeship and Decolonization*, (Spec Ed.)1945-1995 U.N.Y.B. 181, U.N. Sales No. E.95.I.50; *Trusteeship and Decolonization*, 1993 U.N.Y.B. 152, U.N. Sales No. E.94.I.1; *see also* Anghie, *supra* note 23, at 497 (discussing the use of sovereignty to deny colonies standing and how later decolonized countries, by entering the international community, gave "something akin to consent . . . to all that had occurred in the past").

321. *See* Brownlie, *supra* note 25, at 367 (noting the limited impact of the Third World on the law of nations, which Brownlie attributed to effective Western diplomacy, the conservation of new states, and the ability of Western states to use technical expertise and pressure to determine the formulation of agreements); *see also Aspiration and Control*, *supra* note 169, at 728-29, 732-33, 735-37. For instance, it is widely acknowledged that the Third World lost the debates on Permanent Sovereignty Over Natural Resources, and the New International Economic Order. *See* Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX 1974), 14 I.L.M. 251 (1975); General Assembly Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171 (XXVIII) (1973), 13 I.L.M. 238 (1974); General Assembly Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII) (1962), 2 I.L.M. 223 (1963).

322. *See* Jackson, *supra* note 50, at 5-6, 9-11 (analyzing the respect for national borders and sovereignty as mechanisms to permit the worst excesses in sub-Saharan African countries). Moreover, concepts such as "sovereignty" and "domestic jurisdiction" are applied differently to Third, versus First, World countries. *See* Anghie, *supra* note 23, at 497.

323. *See* Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 3 EUR. J. INT'L L. 66 (1992)); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 100-01 (1991) (defining "liberalism" as a concept which proffers a total world view that delimits our ideas about society and possible ways to revise our thinking); Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 420 (David Kairys ed., 1990) (defining "liberal legalism" as a belief structure "that abstracts particular relationships between real people . . . into relations between entirely abstract categories of 'individuals' playing the abstract social roles of 'owner,' ' employee,' etc.").

324. *See* Philip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 815 (1990) (book review) (noting that the New Haven approach to international law assumes a single international community that has values reflecting American liberal values, thus making international law a vehicle for Western cultural imperialism).

ternational community must find a way to make these peoples competent.[325] Trusteeship is posed as the model to achieve this goal.[326] Trust states would essentially be divested of the vestiges of sovereignty, a crucial aspect of statehood.[327] International law will have come full circle and once again the natives will not be sovereign.[328]

A. A CRITICAL ASSESSMENT OF STATEHOOD AND SOVEREIGNTY

Two contrasting theories of international law have been postulated: international law as a culturally grounded system and international law as a rational universal system detached from any particular culture.[329] A number of postmodern[330] scholars have applied critical theory to international law[331] and challenged preten-

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325. *See* Richardson, *supra* note 1, at 6-8, 13-15.

326. Indeed some advocates of trusteeship utilize language and images that speak to this incompetence. Trusteeship is analogized to conservatorship which is imposed to care for those who are incapable of caring for themselves. *See* Helman & Ratner, *supra* note 1, at 12; Johnson, *supra*, note 1, at 22.

327. *See* Gordon, *supra* note 1, at 312-13, 315-17.

328. *See* Anghie, *supra* note 23, at 494-97 (describing natives' lack of sovereignty under colonialism and the mandate system). This appears to be the logical and extreme conclusion to the decline of sovereignty theories. Of course the declining sovereignty construct is not applied to Western nations which are more interdependent, but remain capable of exercising basic control over their affairs.

329. *See Aspiration and Control*, *supra* note 169, at 723 explaining that:

> [I]nternational law is a product of culture; its rules are created and interpreted in a cultural environment that shapes their purpose and their meaning. On the other hand, [international lawyers] argue, international law is bound to no particular cultural context and applies its pure principles to disputes among cultures just as a judge might apply legal rules to factual problems.

Id.

330. *See* Cook, *supra* note 280, at 753 (noting that postmodernism is "characterized by an extreme skepticism of systems' theories or master narratives like orthodox Marxism and Liberalism that delegitimize certain ways of knowing and living while offering suspect justifications of others"). Cook continues to explain that:

> Postmodern critique might be thought of as a strategy for bringing to the surface suppressed narratives and voices drowned out by the univocal projections of master narratives. . . . [It] illuminates the underside of master narratives, thereby exposing the subordination and marginality of alternative social visions whose relegation to the status of exceptions to the rule . . . can no longer be objectively justified.

Id. at 754.

Professor Cook further notes:

> [I]t carves out space for formerly subordinated narratives. No longer can we treat the stories told by Blacks, women and other subordinated groups of their oppression and suffering asepiphenomenal, tangential to a more central narrative of class conflict or of the formal equality of rights bearing citizens. Postmodernism rejects this kind of privileging by both the left and the right as a social construction of illegitimate hierarchy.

Id. at 758.

331. *See* Carty, *supra* note 323, at 66. On the relationship between critical legal theory and international law, Carty states:

> "Critical" international legal studies . . . opposes itself to positivist international law, as repre-

sions of abstract rationalism. They argue that "legal analysis cannot be separated from the political, economic, historical, and cultural context in which people live."[332] Nor can legal analysis be divorced from its cultural and historical roots, which partly explain current biases and the implementation of law in the current international milieu.[333]

Critical legal theorists[334] and feminist legal theorists[335] exposed the distinct cultural grounding of international law and debunked the myth of its presumed universalism.[336] International law is firmly grounded in the liberal tradition[337] and has a universalist compulsion.[338] Liberalism views sovereigns as the center of interna-

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sentative of an actual consensus among States. [It asks] whether a positive system of universal international law actually exists, or whether particular States and their representative legal scholars merely appeal to such positivist discourse so as to impose aparticularist language upon others *as if it were a universally accepted legal discourse.* So post-modernism is concerned with unearthing difference, heterogeneity and conflict *as reality* in place of *fictional* representatives of universality and consensus.

Id.

332. *See* Charlesworth, *supra* note 18, at 613.

333. *See* Anghie, *supra* note 23, at 446.

334. *See id.* at 496-99; *see also* Carty, *supra* note 323; Sunhee Juhon, *CLS: A Pathfinder into the Gospel of Radical Reform*, 8 LEGAL REFERENCES SERVICES Q. 107 (1988) (describing the CLS movement). Termed "New Stream Scholars" by Professor David Kennedy, critical legal scholars "incorporated insights from normative philosophy, critical theory, structuralism, anthropology, prepositional logic, literature, sociology, politics and psychiatry" as methodological approaches to international law. Purvis, *supra* note 323, at 88-89. The application of critical theory to international law is largely a European and American inspired undertaking. *See id.* One notable exception is Antony Anghie's utilization of critical theory to analyze various aspects of colonialism. *See* Anghie, *supra* note 23, at 490-98.

335. *See* e.g., Charlesworth, *supra* note 18; Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 1, 6-7 (Am. Soc'y Int'l L. ed., 1993); Gunning, *supra* note 18, at 190-93; Catherine A. MacKinnon, *Comment: "Theory is Not a Luxury,"* *in* RECONCEIVING REALITY, *supra*, at 83, 85, 90.

336. *See* Cook, *supra* note 280, at 758-59 (noting the post-modern approach "challenge[s] the ways in which knowledge is produced and constituted . . . and explore[s] the ways in which we are socialized into seeing the world and its possibilities in a certain way and dismissing other visions as unreasonable or impossible").

337. *See* Purvis, *supra* note 323, at 93-94, stating:

Liberalism in international law, as elsewhere, can be understood as a philosophy that combines an atomistic psychological assumption with a radical epistemology about morality. The liberal psychological understanding of international law conceives of sovereignty as being the foundation of international life. . . . [I]nternational life is sovereign-centric. Sovereigns are both the subjects and objects of international life. No "natural" world pre-exists the sovereign's appearance. . . In sum, the liberal psychology about our world portrays sovereignty as being all there is to international life. . . . [L]iberalism must claim that decisions about morality can only be made by the international order's atomic components, its sovereigns.

Id.

338. *See* Carty, *supra* note 323, at 68 ("Critical jurisprudence has sought to expose political choice, discredit the 'rights' discourse of legal liberalism, demonstrate the indetermi-

tional society, and liberalism combined with universalism generates a bias against recognizing a broader pluralized perspective or the "very partial, multilayered and fragmented nature of international society."[339] Instead, to be part of international society, peoples must adhere to the universal ideal of being part of a sovereign state. When such conformity is lacking, the resulting systems must be modified to fit what is the norm.[340]

If international law is sovereign-centric,[341] a total loss of sovereignty, as measured by that system, produces an entity that is no longer a primary subject of international law.[342] Thus, "failed" states, and presumably their inhabitants, would no longer be accorded all of the rights and obligations accorded to sovereign states.[343] Having "failed," these states must be rehabilitated if they are to remain a part of the international system. Colonialism is posed as a viable vehicle by which to achieve this goal; although, for those states previously subjected to the system, colonialism proved to be an unmitigated disaster from its inception.[344] There appears to be no alternative means for inclusion in the absence of statehood, and statehood's essential element, sovereignty, is determined in accordance with the international system itself.

B. THE CONTINUING PERVASIVENESS OF RACISM

Critical Race Theory (CRT) utilizes race consciousness to expose the falsity of universalism and neutrality; it assists in explaining racialization and its place in international discourse.[345] Moreover, CRT explains that our perspectives are intimately bound to our unique cultural heritage and are anything but neutral or uni-

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nacy of law, and reveal the bias of liberal ideology."); Purvis, *supra* note 323, at 89 (noting that critical legal jurisprudence "aim[s] to demonstrate how law, through its capacity for 'reification,' 'mystification,' 'legitimization' and 'obfuscation' reinforces social injustice").

339. *See* Carty, *supra* note 323, at 68.

340. *See* Gunning, *supra* note 18, at 193 (explaining that scholars have broached "[T]he inherent bias within international law against non-Western cultures and women, whatever their cultural background"). Western feminists have criticized international law as "embodying a male (white, heterosexual, middle to upper class) perspective . . . [that is] biased against women." *Id.* at 192; *see* Charlesworth, *supra* note 18, at 621-34 (discussing human rights law as "the embodiment and imposition of Western values on other parts of the world.").

341. *See* Purvis, *supra* note 323, at 93 ("The liberal psychological understanding of international law conceives of sovereignty as being the foundation of international life.").

342. *See* Reparations for Injuries Suffered in the Service of the United Nations, *Advisory Opinion*, 1949 I.C.J. 174, 179 (Apr. 11) (supporting the notion that although states are no longer the only subjects of international law, they are still the only entities which possess the full panoply of rights and obligations accorded to international actors).

343. The state, of course, is comprised of individuals and myriad groups of people represented on the international stage by the state. Thus, the loss of sovereignty is a loss of voice, unless we make room for alternative visions of international society.

344. *See* Mutua, *supra* note 5, at 520-24, 527-28, 531; Sylvester, *supra* note 1, at 1314 n.49.

345. *See supra* notes 126-62 and accompanying text.

versal. Professor Aleinikoff postulates that "race-consciousness . . . [is] an entrenched structure of thought that affects how we organize and process information."[346] Race *does* matter, and is one of the first things we notice about each other.[347] Racism is often unconscious,[348] but the pervasiveness and persistence of racism and race consciousness in Western culture, makes its influence omnipresent. Professor Lawrence opines:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[349]

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346. *See* T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1067 (1991).

347. *See id.* at 1066. Whites often assert that they are colorblind because they do not notice or act on the basis of race. But of course we all notice race. Aleinikoff notes:

> Perhaps what is being said is that the speaker does not begin her evaluation with any preconceived notions. But this too is very difficult to believe given the deep and implicit ways in which our minds are color-coded. To be truly colorblind . . . requires color-consciousness: one must notice race in order to tell oneself not to trigger the usual mental processes that take race into account.

Id. at 1079.

348. *See The Id, the Ego, and Equal Protection*, *supra* note 27, at 322-24 (explaining that there are several reasons why racially discriminatory beliefs and ideas are usually unconscious).

> [T]he human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.
>
> Second . . . the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings.

Id.

349. *See id.* at 322. There is often resistance to the idea of unconscious racism because individuals hear this as branding them racist, rather than as describing a cultural milieu in which racism is an integral part of the culture. Even in the current environment of overt racism, where the racist attitudes of many Americans are explicit and out in the open, it is still not acceptable to think of oneself as racist, at least not in middle class circles. *See* Patricia J.

Western views of African peoples cannot help but be shaped by American (and broader European) views of race and by the ubiquity of racism.[349] Racism permeated the entire colonial enterprise, in both its purely exploitative and more "enlightened" phases.[351] Indeed, racism shaped the formation of the entire international legal system.[352] American and European perspectives on African and other colored people generally are negative, having been shaped in European states by the colonial experience,[353] and in America, by the presence and subordination of African-Americans and other people of color.[354] While the United States was not a colonial power in Africa, it did have trust territories in the South Pacific, and thus, shared in the colonial experience.[355] The prevailing American view in this context was similar to European views of racial and cultural inferiority and superiority.[356] Moreover, at home, the worst forms of an often violent racial oppression of blacks

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Williams, *Radio Hoods*, *in* THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE 42 (1995) (discussing the popularity of openly racist and inflammatory radio show hosts such as Howard Stern and Rush Limbaugh). Racism is in some sense unavoidable; we *do* notice the color of the other person's skin, whether we want to or not. How we act upon this knowledge is the second question, and an important one.

350. *See* FANON, *supra* note 314, at 41-43, 215 (noting the similarity of treatment accorded to American blacks by American whites and Europeans toward Africans; whites generally put "all Negroes in the same bag" with respect to culture and a lack thereof).

351. *See* Part IV, *supra*. Racism also influenced the ensuing national movements toward self-determination and nation-building. *See id.*

352. *See* Anghie, *supra* note 23, at 447-48, 497-501 (1993); Williams, *supra* note 318, at 223-26; Williams, *supra* note 130, at 51-52.

353. *See* SAID, *supra* note 23, at xiv, xxi; Kevin Gaines, *Black Americans' Racial Uplift Ideology as "Civilizing Mission," in* CULTURES OF UNITED STATES IMPERIALISM 435 (Amy Kaplan & Donald E. Pease eds., 1993). Fanon states:

> Native society is not simply described as a society lacking in values. It is not enough for the colonist to affirm that those values have disappeared from, or still better never existed in, the colonial world. The native is declared insensible to ethics; he represents not only the absence of values, but also the negation of values. . . . Monsieur Meyer could thus state seriously in the French National Assembly that the Republic must not be prostituted by allowing the Algerian people to become a part of it. All values, in fact, are irrevocably poisoned and diseased as soon as they are allowed in contact with the colonized race. The customs of the colonized people, their traditions, their myths—above all, their myths—are the very sign of that poverty of spirit and their constitutional depravity.

FANON, *supra* note 314, at 41.

354. *See* Richardson, *supra* note 1, at 9; Priscilla Wald, *Terms of Assimilation, in* CULTURES OF UNITED STATES IMPERIALISM 59, 59 (Amy Kaplan & Donald E. Pease eds., 1993); *see also* Dudziak, *supra* note 278, at 77-81 ("Concern about the effect of U.S. race discrimination on cold war American foreign policy led the Truman administration to consider a pro-civil rights posture as part of its international agenda to promote democracy and contain communism."); Vicente L. Rafael, *White Love: Surveillance and Nationalist Resistance in the U.S. Colonization of the Philippines, in* CULTURES OF UNITED STATES IMPERIALISM, *supra* note 353, at 185 (stating that Americans viewed their role in the Philippines as one of "benevolent assimilation" and that this role required a paternal attitude).

355. *See* Rafael, *supra* note 354.

356. *See id.*

and other ethnic minorities continued unabated.[357] The notion of bringing civilization to the natives continued in the concepts of mandate and trusteeship, as well as in the development discourse.[358]

If race in part shapes Western views of the "other," and the prevailing view of black people is and has been overwhelmingly negative, perhaps it is not surprising that colonialism would be proposed as a solution to the problem of disintegrating states. Part of this vision of "the other" has been incompetence.[359] As Frantz Fanon noted, colonialism not only imposed its rule on the present and future of a dominant country but also sought to destroy the past by distorting, distancing and destroying it. The total result of colonial domination was to convince natives that colonialism came "to lighten their darkness."[360]

It seems the West plans again to come and lighten "the darkness." Having found that a number of African states "failed" or "collapsed" as nation-states, the West stands ready to put them back together again by governing until they are taught to govern themselves. It is much like parents taking care of their children

357. *See* Dudziak, *supra* note 278.

358. *See supra* notes 188-217, 288-312 and accompanying text.

359. *See, e.g.*, ROBERT M. KAPLAN & DENNIS P. SACCUZZO, PSYCHOLOGICAL TESTING: PRINCIPLES, APPLICATIONS AND ISSUES 258 (3d ed. 1993) ("Critics charge that intelligence tests not only are biased against certain racial and economic groups but also are used by those in power to *maintain the status quo*") (emphasis added); Linda S. Gottfredson, *Reconsidering Fairness: A Matter of Social and Ethical Priorities*, 33 J. VOCATIONAL BEHAV. 293, 297 (1988) ("*Current black-white mental test score differences reflect a black-white difference in the distribution of* [the factor of general intelligence]. IQ differences between racial-ethnic groups are the rule, not the exception."); John L. Rury, *Race, Region, and Education: An Analysis of Black and White Scores on the 1917 Army Alpha Intelligence Test*, 57 J. NEGRO EDUC. 51, 52 (1988) (describing validation of white superiority in terms of intelligence by Army intelligence tests of 1917: "Whatever anyone else said about the matter, no one could argue with the fact that a national sample of black men had scored substantially lower on a standardized test than had whites"); J. Phillippe Rushton, *Race Differences in Behaviour: A Review and Evolutionary Analysis*, 9 PERSONALITY & INDIVIDUAL DIFFERENCES 1009, 1010-17 (1988) ("First, despite major environmental attempts to ameliorate the situation, the difference between black and white Americans in mean IQ remains as large today as it was at the time of the First World war."); Pat Shipman, *Legacy of Racism; Race and Intelligence; 'The Bell Curve': A Symposium*, NAT'L REV., Dec. 5, 1994, at 34 ("As The Bell Curve suggests, whether low intelligence is fostered by genetic inheritance or nurtured by a culture of poverty, it is nonetheless passed from generation to generation.").

360. *See* FANON, *supra* note 314, at 210-11 ("Colonialism . . . never ceased to maintain that the Negro is a savage . . . [and] the vast continent was the haunt of the savages, a country riddled with superstitions and fanaticism."). The response to this racialization has been continent-wide and racial, rather than national. The culture sought to be created by African intellectuals was an African culture that stands opposed to European Culture. *See id.* at 212. Those "most responsible for this racialization of thought are Europeans who have never ceased to set up white culture to fill the gap left by the absence of other cultures." *Id.* Fanon's point is that Africans have not thought in terms of "national" cultures. *See id.* He also notes how different struggles of black Americans and Africans are. *See id.* at 215-16.

until the children learn to stand on their own two feet. Indeed, scholars proposing modern trusteeship invoke this very analogy.[361]

Perhaps it is time to turn this process on its head and assume that people are quite capable of governing themselves. Indeed, part of the difficulty associated with effective government lies in being compelled to adopt governing structures that do not work within the context of a given culture. No definitive answers are posed, rather a new way of looking at the problem is urged. Such an approach begins with believing in the dignity and worth of every human being and assuming that the ability to construct an appropriate social contract exists. It means devising structures that allow the West to listen and then assist, if called upon to do so.

VII. TOWARD A SOLUTION

No single paradigm can purport to resolve a perplexing and multilayered problem such as the one before the international community, and no such attempt is made here. Rather, what is urged is a change in viewpoint. Professor Gunning reminds us that the alleged neutrality and objectivity of the most commonly accepted perspective is, in reality, just one perspective out of many.[362] Professor Barnes postulates that social reality can be "understood only if a plurality of voices articulates different points of view; understanding suffers when some voices are silenced."[363] Critical scholars call for including and respecting "all 'voices' or perspectives, and counsel against the tendency 'to treat one's own perspective as true rather than as one of many possible points of view.'"[364] Thus, the first step might be to question our assumptions about other peoples, and our arrogant belief in the supremacy of our knowledge and institutions. The focus must be "on multicultural dialogue and a shared search for areas of overlap, shared concerns, and values."[365]

International law focuses on institutions and the privileges and powers of states; the silence of the peoples of these communities, in transforming international law, is deafening.[366] Shifting the focus to people emphasizes justice and change.[367]

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361. *See* Helman & Ratner, *supra* note 1, at 12; Johnson, *supra* note 1, at 22.

362. *See* Gunning *supra* note 18, at 190 (noting that the "common perspective" usually represents the view of white heterosexual middle to upper middle class males).

363. *See* Barnes, *supra* note 137, at 1870 ("Minority scholars are uniquely positioned to assist in the goal of breaking this silence . . . [T]he realization of one's 'otherness' in relation to American culture . . . create a valuable prism through which the ideals and reality of this country can be examined.").

364. *See* Gunning, *supra* note 18, at 190 (quoting Martha Minnow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 48 n.1 (1988)). Gunning discusses the tension between the notion of "universally valid moral beliefs and right and wrong rules and modes of conduct." *Id.* (quoting MARVIN HARRIS, THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE 13 (1968)).

365. *See* Gunning, *supra* note 18, at 191.

366. While many African scholars have been heard on these issues, I am not sure this is enough because African-American or leftist intellectuals cannot be presumed to speak for an entire group of people. Many scholars are educated and often live in the West, speaking

Critical Race Theory has "insisted on the need to incorporate the concrete, practical realities of oppressed people into agendas for reform."[368] This premise helps work toward finding new mechanisms that allow communities to organize themselves in their own images.

Trusteeship is the epitome of a top down approach that is at the apex of the state paradigm, and involves taking over the state for the purpose of rehabilitation. Trusteeship also puts the West at the center of the process. A different approach begins not at the apex, but at the other end of the spectrum—at the foundation of the state. A necessary part of this change in perspective entails dialogue across racial and cultural lines and inquiries into the life experiences of the people we assist.[369] This inquiry might generate new theories of justice based on "intuition, guided by reason, [and] tested against the lives of real people."[370] Matsuda reasons that "[t]he normative intuitions of those on the bottom are often different from the intuitions of those on top,"[371] and these intuitions are useful in making normative choices.[372] Of course, this also means removing ourselves from the center of the discussion and the process.[373]

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for the entirety of African-Americans is even more difficult than the contradictions facing first world scholars who deal only with the differences that arise from class. This is not to vilify or degrade these scholars, but only to suggest that we dig deeper and directly consult those whose lives are affected by the decisions made by the international community.

367. *See* Vale, *supra* note 3, at 290.

368. *See* Barnes, *supra* note 137, at 1867. Critical Race Theory also "refused to ignore the difference between race and class as a basis of oppression." *Id.* at 1868. Critical Legal Studies (CLS), on the other hand, views the poor as "disempowered, helpless and nonculpable co-conspirators in their own oppression." *Id.* There is a tendency by CLS scholars to "imply that the focus upon race is misplaced because it hampers efforts to foster class-based resistance to what they view as economic oppression." *Id.*

369. *See* Matsuda, *supra* note 17, at 359 (maintaining that "those on the bottom know how bad life is without the substantive and intangible goods the philosophers ponder"). Matsuda postulates that the "expanded consciousness of the actual experience of racism is a method of theoretical inquiry available to CLS scholars in responding to the problem of normative priority." *Id.* at 359-60.

370. *See id.* at 360.

371. *See id.* For example, black Americans are quick to detect racism, to distrust official claims of necessity, and to sense a threat to freedom. Matsuda also believes that the "minority perspective cuts across class lines." *Id.*

372. *See id.* (supporting looking to the bottom, taking advantage of and using our multiple consciousness). Matsuda suggests that those who experience discrimination speak with a special voice that we should heed and maintains that "looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice." *Id.* at 324.

373. *See* Grillo & Wildman, *supra* note 131, at 402, observing:

> [M]embers of dominant groups assume that their perceptions are the pertinent perceptions, that their problems are the problems that need to be addressed, and that in discourse they should be the speaker rather than the listener. Part of being a member of a privileged group is being the center and the subject of all inquiry in which people of color and other non-privileged groups are the objects.

International law plays a role "by demonstrating a concern with the development of people as opposed to the preservation of states, which often prey on their citizens."[374] Other ways of organizing mankind beyond the nation-state may exist,[375] and new forms of reference are needed.[376] The use of intervention to impose our view of the world is generally hypocritical and rarely successful.[377] Moreover, the U.N. is structured in such a way that it excludes those outside the mainstream.[378]

Professor Vale argues that U.N. reform has "favored established routines over innovation by entrenching the interests of those who already enjoy power."[379] Thus, "the interests of the nation-state are preferred over those of the world's citizens."[380] But Vale notes that the institution of the nation-state alienated those at the margins who, faced with poverty and stagnated reform, turned away from intercourse with the state.[381] Moreover, this focus on the nation-state reflects the "'might-is-right' calculus."[382]

Thus, to rebuild "failed states," perhaps we should start at the bottom rather than the top by focusing on the peoples themselves, without preconceived ideas of the answers or the solutions.[383] While the West can contribute much to the dia-

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Id.

374. *See* Vale, *supra* note 3, at 290.

375. *See id.* at 290-91.

376. *See id.* at 291.

377. *See* Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 345-351 (1995).

378. *See* Vale, *supra* note 3, at 291 (noting that the select international agencies, such as UNICEF, the FAO, and the WHO, have made great efforts to reach the people of the world). These agencies are dependent on the "U.N. system, which, in turn, is dependent on the nation-state, and thus even their successes have remained riddled with deficiencies. For the world's marginalized, the effect of emphasizing the nation-state over the individual has been catastrophic." *Id.*

379. *See id.* at 286.

380. *See id.* at 286 (noting the complex labyrinth of mandates, resolutions, and credentials of the Security Council and General Assembly utilize to ultimately protect and fortify the nation-state).

381. *See id.*

382. *See id.* at 287 (citing the example of the Security Council which he characterizes as having a "narrow, top-down, masculinized, Anglo-American analysis of international events," and whose prime preoccupation is "the security and well-being of states, rather than of ordinary people").

383. There may be severe problems with solutions viewed as "given." There is a need to carefully examine proposed solutions, such as democratization and large scale humanitarian intervention by the U.N. For instance, difficulties may arise in attempting democratization in certain situations, unless we greatly broaden our view of the concept of "democracy." In reality, the initial movements toward democracy in Africa and Eastern Europe have sometimes fueled nationalism and actually undermined democratization. Nationalism also has the potential to become narrowly based and destroy whatever viability is left. *See* Ottaway, *supra* note 84, at 235, 243.

The expectation that democracy will act as an integrating force capable of consolidating collaps-

logue, perhaps it should only suggest, rather than insist on, the acceptance of its views. Westerners should attempt to discern how peoples would prefer to organize themselves and heed those voices by making room for them in international society regardless of the form that voice takes. This solution entails reconceptualizing international institutions that are presently based on the nation-state as the representational unit. But the nation-state is a relatively new entity in historical terms[384] and is currently fraying at the margins.[385] Perhaps it is time to contemplate new social formations that are more in line with the wishes of the peoples our present institutions purport to serve and represent. Whatever the new emergent formations, international law should make every effort to make space for them.

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ing states or of creating viable new ones is largely based on the experience of nineteenth-century Europe. That period saw the crumbling of the Austro-Hungarian empire but also the merger of small principalities and city-states into large entities. . . . The nationalist movements that led to the collapse of the empire and the disappearance of smaller states were also democratic movements.

Id. at 242.

Moreover, in many of these countries, the economy is not a separate sphere where people exercise power and enrich themselves and thus there may be little to fight over except political power. *See id.* at 243. "[T]he international community is encouraging democratization, and occasionally forcing [elections] on reluctant governments by withholding aid. Democratization, however, has been interpreted very narrowly as the holding of elections. . . . But elections, or the prospect of elections, are highly destabilizing in countries threatened with collapse." *Id.* at 245. Perhaps a different approach to democratization is needed because "[e]lections held under the wrong conditions can be a real set-back for democratization" *Id.* at 245. Thus, this process may "accelerate rather than prevent the collapse of an already weakened state." *Id.* at 244.

384. *See* YOUNG, *supra* note 37, at 32.

385. Many do not identify with the state, therefore it is no longer capable of taking care of citizens by itself, and must rely on new supranational formations such as the European Community to effectuate state roles.